

1 **IN THE UNITED STATES DISTRICT COURT**
2 **FOR THE WESTERN DISTRICT OF TEXAS**
3 **AUSTIN DIVISION**

4 GIBRALTAR CABLE BARRIER SYSTEMS, LP,) AU:16-CV-00418-LY
5 GIBRALTAR MATERIAL DISTRIBUTION, LP, NEUSCH)
6 INNOVATIONS, LP, FOUNDATION FENCE, INC.,)
7 and WILLIAM H. NEUSCH,)
8 Plaintiffs,)
9))
10 v.) AUSTIN, TEXAS
11))
12 STEPHEN NEUSCH, NEU SECURITY SERVICES, LLC,)
13 and BLACK SECURITY PRODUCTS, LLC,)
14 Defendants,)
15))
16 v.)
17))
18 BETAFENCE USA, LLC and PAUL NEUSCH,)
19 Third-Party Defendants.) AUGUST 1, 2016

20 *****
21 TRANSCRIPT OF MOTIONS HEARING (CONTINUED)
22 BEFORE THE HONORABLE LEE YEAKEL
23 *****

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20 Proceedings recorded by computerized stenography, transcript
21 produced by computer.

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09:29:10 1 (Open Court)

09:29:10 2 THE COURT: We are here today for the continuation of

09:29:15 3 the consideration of the motions in *Gibraltar Cable Barrier*

09:29:18 4 *Systems, LP*, and others v. *Stephen Neusch*, and others, Cause

09:29:23 5 Number 16-CV-418. Let me get announcements by the parties as

09:29:29 6 to who is here today. And I'll start with the plaintiff.

09:29:35 7 MR. TAYLOR: Donald Taylor, Cab Connor, and Natalie

09:29:36 8 Taylor as attorneys for the plaintiffs, Your Honor.

09:29:38 9 THE COURT: All right. And for the defendants?

09:29:40 10 MS. GHAVIMI: Darlene Ghavimi and Charles Rogers for

09:29:43 11 the defendants, Your Honor. And we're with Stephen Neusch, my

09:29:47 12 client.

09:29:47 13 THE COURT: All right. Well, we have had other

09:29:50 14 hearings in this case and some meetings in chambers. And what

09:29:54 15 I have scheduled for today is what, for want of a better word,

09:29:59 16 I'll call a wrap up of any evidence that anyone wants to

09:30:03 17 present on the particular motions that I have in front of me

09:30:08 18 which are the plaintiffs' motion for a preliminary injunction

09:30:15 19 and appointment of a receiver.

09:30:18 20 Is there anything we need to take up before we get

09:30:22 21 into presenting evidence in this case?

09:30:26 22 MR. TAYLOR: Just we did get together on the

09:30:28 23 exhibits, Judge, so we've got just about all the exhibits

09:30:33 24 agreed to. With respect to the Defendant's Exhibits 13 through

09:30:40 25 67, we agree to the admissibility of those exhibits, except for

09:30:44 1 Exhibit Number 53. So for the court reporter's purposes,
09:30:48 2 that's Defendant's Exhibits 13 through 67 are agreed to, except
09:30:52 3 for Exhibit Number 53.

09:30:55 4 And with respect to Plaintiffs' exhibits, it's --
09:30:59 5 agreed that Exhibits 1 through 127 are agreed to be admitted
09:31:04 6 except for 21, 22, 30, 31, and 32. And a large portion of
09:31:16 7 those exhibits have already been admitted in the previous
09:31:19 8 hearings. But I think that includes the entire range.

09:31:21 9 Your Honor, just preliminary, what we intend to do
09:31:24 10 today is focus on the things that -- that you indicated that
09:31:27 11 you wanted in chambers. And we will be presenting evidence
09:31:32 12 with respect to the right to sell, market, and manufacturer the
09:31:38 13 four products that are in dispute. We have a short -- we'll
09:31:43 14 kick this off with a short, I think, 16-minute deposition of
09:31:47 15 the testing facility. And then we will, in addition, since we
09:31:51 16 were fortunate enough to have a supplemental report by
09:31:56 17 Mr. Reynolds, we're going to call him. And we intend to really
09:31:59 18 just focus on the elements and cleaning up the evidence with
09:32:04 19 respect to these products and things that have happened since
09:32:09 20 the last hearing.

09:32:09 21 THE COURT: All right. And let me hear from the
09:32:12 22 defendant. Initially, Mr. Rogers, do you agree with what
09:32:19 23 Mr. Taylor's statements were, the exhibits to which there is no
09:32:23 24 objection to admissibility?

09:32:25 25 MR. ROGERS: Yes, Your Honor.

09:32:25 1 THE COURT: All right. So listen to me carefully and
09:32:28 2 make sure I get this right.

09:32:30 3 Then Defendant's Exhibits 13 through 67, inclusive,
09:32:37 4 with the exception of Exhibit Number 53 are admitted, and
09:32:45 5 Plaintiffs' Exhibits 1 through 127, inclusive, with the
09:32:50 6 exception of Exhibits 21, 22, 30, 31, and 32 are admitted; is
09:32:57 7 that correct?

09:32:59 8 MR. ROGERS: Yes.

09:33:00 9 MR. TAYLOR: Yes, Your Honor.

09:33:01 10 THE COURT: Then those are admitted.

09:33:03 11 Now proceed, Mr. Rogers.

09:33:11 12 MR. ROGERS: Just one procedural matter before we get
09:33:11 13 to presentation of the evidence. I received over the weekend,
09:33:12 14 I believe on Saturday, Document Number 59, which is --

09:33:17 15 THE COURT: Don't say Document Number 59, because
09:33:20 16 that would indicate it's different from either Plaintiffs'
09:33:28 17 exhibits or Defendants' exhibits.

09:33:29 18 MR. ROGERS: Pacer docket number.

09:33:31 19 THE COURT: Okay. Pacer docket number. All right.

09:33:32 20 MR. ROGERS: So it was a filing, and it's entitled
09:33:34 21 Third-Party Defendant Betafence's Notice of Supporting Joinder
09:33:38 22 in Plaintiffs' Motion For Preliminary Injunction and Order
09:33:41 23 Appointing Receiver.

09:33:42 24 Betafence is a third-party defendant who has entered
09:33:46 25 an appearance in this case, but they have not filed any

09:33:49 1 counterclaims. And so, procedurally, it doesn't make any sense
09:34:01 2 for a party who doesn't have any pleadings to join in a motion.
09:34:05 3 They have a standing issue.

09:34:08 4 THE COURT: Well, at the end of the day, I don't
09:34:17 5 think it matters a whole lot because I'm going to be
09:34:20 6 concentrating on the -- on the motions that I have in front of
09:34:23 7 me. And, if I grant them, they're granted and, if I deny them,
09:34:28 8 they're denied, regardless of who is attempting to come in as a
09:34:43 9 third party. I do agree that it would be somewhat out of
09:34:44 10 sequence to have a third party joinder before there's a third
09:34:53 11 party who has actually entered the case. But I don't think
09:35:01 12 that's of a major concern here today.

09:35:03 13 MR. ROGERS: I have one concern I'd like to raise and
09:35:06 14 I think the reason why they filed a motion -- they can tell us,
09:35:08 15 but it's not a motion. I think the reason why they filed the
09:35:12 16 notice is because there's a standing issue for all of the
09:35:14 17 plaintiffs, and this may be an attempt to try to cure that
09:35:21 18 standing issue, by bringing in the party that they may assert
09:35:24 19 does have standing for the request for relief they're asking in
09:35:27 20 this preliminary injunction.

09:35:28 21 There's two issues that have come up since the last
09:35:31 22 hearing that we've had. There's been allegations of patent
09:35:39 23 rights. If you'll recall at the last hearing when we were
09:35:41 24 talking about scheduling this hearing and what you wanted to
09:35:47 25 hear from the parties included for their attempt to get a

09:35:50 1 preliminary injunction against four disputed products, to
09:35:54 2 enjoin the defendants from selling four disputed products,
09:36:00 3 you wanted to know whether or not there was any patent coverage
09:36:02 4 for any of these products, and also who made the products
09:36:05 5 first. And so through discovery in preparation for this
09:36:08 6 hearing, there's been allegations -- assertions of patent
09:36:15 7 rights from the plaintiffs. And there's one patent and two
09:36:19 8 pending patent applications.

09:36:21 9 The problem is there's only one patent that they're
09:36:24 10 throwing around, and it's not owned by any of the plaintiffs.
09:36:28 11 It's owned by Betafence. And I believe that's why they're
09:36:32 12 trying to bring in Betafence to join in the motion, so they
09:36:35 13 can assert patent rights. But the problem is, of course, that
09:36:38 14 Betafence not only hasn't asserted -- they haven't asserted any
09:36:43 15 counterclaims, but they certainly haven't asserted any patent
09:36:45 16 infringement counterclaims.

09:36:47 17 And -- but there's a bigger problem. There's a
09:36:54 18 bigger problem. There's something buried in the documents that
09:36:56 19 we found over the past few days that they haven't told you
09:37:00 20 about, and that has to do with a standing issue on the notice
09:37:03 21 of termination. They call it a termination agreement. That
09:37:06 22 agreement, which is the foundation for the request for
09:37:09 23 preliminary injunction, has been assigned to Betafence.
09:37:15 24 There's an assignment in the Betafence sale agreement where --
09:37:20 25 where Gibraltar sold assets to Betafence. They've assigned

09:37:30 1 away all their rights.

09:37:30 2 The plaintiffs have no standing in this case to
09:37:33 3 request the relief that they're asking for to the extent
09:37:35 4 they're basing their request for relief on a breach of a notice
09:37:38 5 of termination agreement. Betafence is the only party that has
09:37:45 6 that right, they're a third-party defendants, and have not
09:37:47 7 asserted any counterclaims in this case, certainly not for
09:37:52 8 breach of the termination notice agreement and certainly no
09:37:54 9 claims for patent infringement.

09:37:56 10 So we'll put on evidence of that. But as a
09:38:01 11 procedural issue, I wanted to let you know what's going on
09:38:04 12 here.

09:38:11 13 THE COURT: Well, number one, let me just say every
09:38:15 14 time I say something in the courtroom, I regret that I said it.
09:38:19 15 Okay? That's just the nature of the beast. I made a passing
09:38:24 16 inquiry about whether there was any patent coverage on the
09:38:32 17 products that were being argued about at a very early stage in
09:38:36 18 this game. That was only because I wanted to know. It did not
09:38:40 19 mean that I thought it was going to be an issue in this case.
09:38:46 20 So, initially, I don't want to hear a lot about patents today.
09:38:50 21 That is not something that I have concern about on whether I'm
09:38:53 22 going to grant the preliminary relief that is sought by the
09:38:56 23 plaintiffs.

09:38:57 24 I would have preferred, as I indicated early on, that
09:39:04 25 you would have spent more of your time trying to resolve this

09:39:07 1 case or that the parties would have spent more of their time
09:39:11 2 trying to resolve this case than worrying about what I was
09:39:15 3 thinking about.

09:39:17 4 I just got back from our biannual judicial
09:39:20 5 conference, and one judge got up and talked about how the
09:39:23 6 lawyers always do a psychological evaluation of the judge
09:39:27 7 whenever you say something. So this just confirms what the
09:39:30 8 judge's observations were about, well, let's psychologically
09:39:36 9 evaluate what the judge thought when he mentioned the word
09:39:38 10 "patent."

09:39:39 11 But that is not something that I'm going to hinge my
09:39:43 12 decision on, on what we have in front of us today. So don't
09:39:46 13 spend a lot of time worrying about that. I am concerned about
09:39:55 14 the merits of this. I am concerned about what has been
09:39:58 15 covered. I continually say, and I say again, knowing what I
09:40:05 16 know about this case, I think both sides -- and I'm referring
09:40:09 17 to the parties, not the lawyers -- are being unreasonable here.
09:40:15 18 I think this is a matter that should be resolved and it should
09:40:19 19 be resolved by the parties.

09:40:27 20 And I think this is a wonderful thing, that the
09:40:31 21 lawyers and the accountants are making as much money as they
09:40:35 22 are. But what is happening is money is being spent that could
09:40:38 23 be better spent among the parties so they can get on about
09:40:42 24 their business of making money instead of spending time in the
09:40:46 25 courtroom.

09:40:46 1 But, for whatever reason, the decision has been made
09:40:56 2 to continue to push with litigation, but I think that's the
09:40:58 3 wrong way to approach this case and I had thought it was the
09:41:02 4 wrong way to approach this case from the beginning. But it
09:41:05 5 takes two sides to reach a resolution; and, clearly, one or
09:41:12 6 both sides is not particularly interested in resolving this
09:41:16 7 case. So we will see.

09:41:20 8 What else before the plaintiff goes forward?

09:41:25 9 MR. ROGERS: Nothing from the defendants, Your Honor.

09:41:26 10 THE COURT: All right. Mr. Taylor, are you ready?

09:41:28 11 MR. TAYLOR: Yes. We're ready, Your Honor.

09:41:31 12 Play the deposition of KARCO.

09:41:41 13 MS. GHAVIMI: Your Honor, we objected to this
09:41:42 14 deposition as untimely because it was taken over the telephone
09:41:46 15 with less than seven days notice, and we were not --

09:41:49 16 THE COURT: I can't hear you.

09:41:52 17 MS. GHAVIMI: We were -- we objected to this
09:41:54 18 deposition as untimely because it was scheduled over the
09:41:58 19 telephone without prior request and negotiation with the
09:42:04 20 defendants. Also we were not given enough time to -- to
09:42:08 21 schedule a flight out there and prepare to be present. We also
09:42:12 22 were not able to -- we received the documents in response to
09:42:17 23 the subpoena the day before. And also we were not given these
09:42:19 24 designations prior to -- prior to presentation today.

09:42:25 25 THE COURT: Response?

09:42:28 1 MS. TAYLOR: Your Honor, Defendants subpoenaed this
09:42:31 2 entity, KARCO, without talking to us about it first, and they
09:42:38 3 did a subpoena for documents. What we did -- they didn't
09:42:41 4 include a business records affidavit. What we did is request
09:42:45 5 notice of telephone deposition to ask questions about the
09:42:48 6 documents that Defendants subpoenaed.

09:42:50 7 They did not move to quash the deposition.

09:42:54 8 Ms. Ghavimi attended by telephone. In fact, she sent her
09:42:58 9 exhibits to the court reporter two days before the deposition.
09:43:01 10 Everybody got the documents from KARCO at the same time, we all
09:43:05 11 had one day to review them, and we got to ask our questions
09:43:09 12 about the documents.

09:43:09 13 THE COURT: Ms. Ghavimi, you can respond.

09:43:12 14 MS. GHAVIMI: The purpose of -- of objecting to
09:43:18 15 notice is that we shouldn't have had to send our documents by
09:43:21 16 e-mail. We should have had sufficient time to attend and
09:43:25 17 review the documents. The reason we subpoenaed the documents
09:43:29 18 is because we requested the documents from KARCO and were
09:43:33 19 refused.

09:43:34 20 We were not given sufficient notice of a telephone
09:43:38 21 deposition. We were never intending to take a deposition to
09:43:45 22 authenticate the documents. We just requested the documents.
09:43:50 23 We were going to decide later if we intended to use them.

09:43:56 24 THE COURT: Well, two things. One, I'm going to
09:43:57 25 overrule the objection to the deposition. I'm going to hear

09:44:02 1 what is put in front of me, and then I will determine the
09:44:04 2 weight of it. But before you play the deposition, I would like
09:44:07 3 some identification of the deposition. It just started out. I
09:44:10 4 have no idea who this person is or what I'm going to hear from
09:44:14 5 or anything like that. So can I have some explanation of the
09:44:18 6 deposition.

09:44:20 7 MS. TAYLOR: Yes, Your Honor. This is Tom Peng of
09:44:23 8 KARCO Engineering. He is the general manager of KARCO and the
09:44:28 9 designated corporate representative under our deposition
09:44:31 10 notice. KARCO is the testing lab that performed the crash
09:44:40 11 tests and provided the certifications on the disputed products.

09:44:43 12 THE COURT: All right. You may proceed.

09:44:52 13 (Video played)

09:44:52 14 **TOM PENG,**

09:44:52 15 testified as follows by deposition:

09:44:52 16 **DIRECT EXAMINATION**

09:44:52 17 **BY MS. TAYLOR:**

09:44:53 18 Q. Good afternoon. Mr. Peng, can you please state your full
09:44:55 19 name for the record?

09:44:56 20 A. My full name is Tom Peng.

09:44:59 21 Q. And who is your employer?

09:45:04 22 A. KARCO Engineering.

09:45:05 23 Q. What is your title at KARCO?

09:45:07 24 A. General manager.

09:45:08 25 Q. If you can please briefly explain to the Court what KARCO

09:45:12 1 Engineering does and what your role is in the company.

09:45:15 2 A. Yes. KARCO Engineering is an automotive --

09:45:21 3 THE COURT: Stop right there.

09:45:25 4 (Audio stopped)

09:45:25 5 THE COURT: I'm having a hard time understanding.

09:45:27 6 What was the name of the company?

09:45:32 7 MS. TAYLOR: KARCO Engineering, K-A-R-C-O. And I
09:45:36 8 should probably also mention that there will be reference to
09:45:39 9 deposition exhibits. Those will be K-1 through -24. And they
09:45:45 10 correspond to Plaintiffs' 101 through 124.

09:45:48 11 THE COURT: Well, you're going to need to make sure
09:45:50 12 when we close this hearing that the record is absolutely clear
09:45:54 13 what he's talking about.

09:45:55 14 MS. TAYLOR: Okay.

09:45:57 15 THE COURT: I think that may get it, but often when
09:45:59 16 the Circuit reviews the record, they don't pick up on it quite
09:46:09 17 as readily as we do.

09:46:09 18 MS. TAYLOR: Yes, Your Honor.

09:46:09 19 THE COURT: So I'll ask you to come back to that.

09:46:09 20 All right. Now proceed.

09:46:09 21 (Audio played)

09:46:09 22 A. -- test various products against different procedures.

09:46:13 23 And we follow those procedures per our ISO standard quality.

09:46:16 24 And we provide ratings for the products that we test.

09:46:20 25 Q. Has KARCO performed crash tests and generated crash test

09:46:28 1 reports for Gibraltar and the Gibraltar family of companies?

09:46:31 2 A. Yes, we have.

09:46:33 3 Q. ... Exhibit K-1 aside.

09:46:35 4 Now, turning to Exhibits K-2 through -24, now, is --

09:46:40 5 I think you said you -- you've reviewed them generally?

09:46:44 6 A. Yes.

09:46:46 7 Yeah. Subpoena.

09:46:48 8 Q. I guess more broadly, are these documents part of the

09:46:54 9 document production that KARCO made yesterday?

09:46:56 10 A. Yes.

09:46:57 11 Q. So you recognize these as KARCO documents?

09:47:01 12 A. Yes.

09:47:01 13 Q. Okay. Can you please identify Exhibit K-2 for me.

09:47:07 14 A. Sure. This is a KARCO Engineering crash test report for

09:47:11 15 the Gibraltar Cable Barrier Systems M50 P2 cable crash fence.

09:47:18 16 K-2.

09:47:18 17 Q. Okay. Does the crash test report have an identification

09:47:27 18 number on it?

09:47:27 19 A. Yes, it does.

09:47:28 20 Q. Can you read that number, please.

09:47:30 21 A. It's called out as the test report number, which is -- in

09:47:33 22 this one it's TR-P30050-01-NC.

09:47:47 23 Q. And do all of KARCO's crash test reports have report ID

09:47:51 24 numbers on them like this one?

09:47:53 25 A. Yes.

09:47:53 1 Q. What does the suffix -NC stand for on -- inside the ID
09:47:59 2 number?

09:47:59 3 A. Yeah. So normal document control procedures, "NC" means
09:48:05 4 that it's the original, that there's no change. So if there
09:48:09 5 are changes to this and how we track those changes, you
09:48:13 6 would -- it would go from an "NC" to an "A" to a "B" to a "C,"
09:48:17 7 and so forth.

09:48:19 8 Q. So based on this report number, can you identify this as
09:48:23 9 the original crash test report for the NP50 P2 cable crash
09:48:29 10 fence?

09:48:29 11 A. That is correct.

09:48:30 12 Q. ... cover K-5, so can you please turn to Exhibit K-6 and
09:48:37 13 identify that document for me, please. What type of document
09:48:43 14 is it?

09:48:43 15 A. Yeah. K-6 is a -- it's -- it's -- it's called an ISO
09:48:48 16 report change notice.

09:48:57 17 Q. And what does KARCO do with these documents? What do you
09:49:00 18 use it for?

09:49:01 19 A. Yeah. So as part of our quality system and maintaining
09:49:04 20 our records, we fill this out when there's a change to a
09:49:08 21 document.

09:49:09 22 Q. Does KARCO fill it out when KARCO is making a change to a
09:49:20 23 document or somebody else is making a change?

09:49:23 24 A. No. When we're making a change. So this would be like an
09:49:26 25 internal recordkeeping.

09:49:28 1 Q. So from this report can you tell -- does it indicate that
09:49:32 2 a change was requested and by whom and when?
09:49:37 3 A. Yes.
09:49:37 4 Q. Can you identify those things for me?
09:49:40 5 A. Yeah. I guess the when is 8/25/2011. By who, it's
09:49:50 6 Michael McBride.
09:49:50 7 Q. And what specifically did he request be changed?
09:49:58 8 A. He requested the test report to be changed from Gibraltar
09:50:02 9 to NSS.
09:50:03 10 Q. And do you know whether that change was in fact made by
09:50:09 11 KARCO?
09:50:11 12 A. Did we execute the -- this change?
09:50:16 13 Q. Yes.
09:50:16 14 A. Yes. I have it.
09:50:21 15 Q. Okay. Is K-8 a copy of the amended version of the crash
09:50:24 16 test report that was -- that we looked at as Exhibit K-2?
09:50:28 17 A. That is correct. He was no longer an employee here.
09:50:33 18 Q. And can you please identify K-7 for me.
09:50:36 19 A. Oh. K-7 is an e-mail chain from Michael McBride to Kelsey
09:50:47 20 Chu. Photos.
09:50:48 21 Q. Okay. Now, can you identify this date of Mr. Chu's e-mail
09:50:53 22 to Michael McBride?
09:50:55 23 A. Yes. That would be August 25th, 2011.
09:50:59 24 Q. Is that the same date of the report change notice
09:51:04 25 identified in Exhibit K-6?

09:51:06 1 A. That is correct.

09:51:08 2 Q. So looking at K-8, can you explain to me what you can tell

09:51:17 3 from this crash test report?

09:51:20 4 A. It's a KARCO test report issued to NEU Security Services

09:51:30 5 for the M50 P2 cable crash fence.

09:51:34 6 Q. Okay. And what about the test report number?

09:51:40 7 A. Yeah. The test report number is the same number as

09:51:46 8 before, except the "NC" has been changed to an "A."

09:51:51 9 Q. What is the date of this new report?

09:51:55 10 A. I'm sorry?

09:51:56 11 Q. The date --

09:51:57 12 A. Oh, the date. Sorry.

09:51:58 13 Q. -- of the report?

09:51:59 14 A. August 25th, 2011.

09:52:02 15 Q. And is that the same day of Mr. Chu's e-mail and the

09:52:07 16 report change notice that we looked at in Exhibits K-6 and K-7?

09:52:12 17 A. Yes, it is.

09:52:13 18 Q. Have you had a chance to review this crash test report?

09:52:21 19 A. Yes.

09:52:21 20 Q. Well, let's look at it a little deeper. Does the revised

09:52:26 21 report in Exhibit K-8 contain an explanation of the changes

09:52:29 22 that would have been made from the original version?

09:52:32 23 A. Yes.

09:52:34 24 Q. Can you direct the Court to that?

09:52:36 25 A. Yes. The third page in, there's a -- a page called

09:52:47 1 Revision Control Log which lists the original test reports.

09:52:59 2 And when there's a -- that there was a change to "-A." And the

09:53:05 3 description of that change is "changed product to NEU Security

09:53:07 4 Services from Gibraltar."

09:53:15 5 Q. All right, Mr. Peng. Just to summarize, looking at

09:53:23 6 Exhibits K-2 through K-8, K-2 relates to the Gibraltar M50 P2

09:53:32 7 cable crash fence. And isn't it correct that, based on a phone

09:53:37 8 call that -- or not a phone call -- but based on some sort of

09:53:41 9 request from a Mr. Michael McBride, KARCO issued a report

09:53:47 10 change notice and amended the crash test report for the cable

09:53:51 11 crash fence to substitute in NEU Security Services' name for

09:53:58 12 Gibraltar's name; is that correct?

09:54:02 13 You can answer the question.

09:54:03 14 A. That will -- that is correct.

09:54:04 15 Q. And there was no actual new crash test that was performed;

09:54:08 16 is that correct?

09:54:09 17 A. There is no new crash test that was performed. That is

09:54:12 18 correct.

09:54:12 19 Q. The same product and the same crash test, all that

09:54:16 20 happened was the report itself was amended to substitute NEU

09:54:19 21 Security's name for Gibraltar's name; is that right?

09:54:21 22 A. That is correct.

09:54:24 23 That is correct.

09:54:25 24 Q. And was this request made by NSS?

09:54:31 25 A. From our change log, the request was made by

09:54:35 1 Michael McBride, an employee of NSS.

09:54:37 2 Q. All right, Mr. Peng. If you could please look at

09:54:44 3 Exhibit K-9?

09:54:53 4 A. Yes.

09:54:53 5 Q. Could you identify this document for me, please?

09:55:00 6 A. This is the KARCO test report for the M50 P1 eight-foot

09:55:06 7 wedge.

09:55:06 8 Q. Now, if you could please turn to Exhibit K-12 and identify

09:55:10 9 that document for me.

09:55:11 10 A. It is a test report for Gibraltar M50 P1 six -- 14.6 wedge

09:55:28 11 barrier. Sorry. I didn't quite understand.

09:55:30 12 Q. So we just went through Exhibit K-12 and Exhibit K-9 are

09:55:38 13 both crash test reports for Gibraltar wedge barriers. One was

09:55:45 14 for an eight-foot wedge barrier, and the other one was for a

09:55:47 15 14 1/2-foot wedge barrier.

09:55:51 16 To your knowledge, sitting here today, have you found

09:55:53 17 in KARCO's records a crash test report for a NEU Security

09:55:56 18 Services wedge barrier?

09:56:00 19 A. No.

09:56:01 20 Q. All right. If you could please turn to Exhibit K-15 and

09:56:09 21 identify that document for me.

09:56:16 22 A. This is a crash test report for Gibraltar Cable Barrier

09:56:21 23 System K12 cable restraint barrier, 24 feet.

09:56:26 24 Q. All right. Could you please turn to exhibit K-18 and

09:56:36 25 K-19.

09:56:37 1 A. K-18 I have and K-19.

09:56:40 2 Q. Okay. Can you identify these documents and tell me what

09:56:46 3 they mean based on your knowledge of KARCO and its operations?

09:56:56 4 A. K-18 is the report change notice where we document our

09:57:07 5 revisions to our documents. This one is for the report number

09:57:15 6 TR-P301 -- let's see -- 15-01-NC.

09:57:24 7 Q. Is that the document that we just reviewed marked as

09:57:29 8 Exhibit K-15?

09:57:34 9 A. Yes. That is correct.

09:57:36 10 ... to NSS.

09:57:37 11 Q. If you turn to K-19, does it reflect the change that was

09:57:46 12 requested by Mr. McBride on August 25th, 2011?

09:57:49 13 A. Yes, it does.

09:57:53 14 ... NEU Security Services.

09:57:54 15 Q. And looking at the report number, can you tell whether

09:57:56 16 this report was an original crash test report or an amended

09:58:00 17 version of an old report?

09:58:02 18 A. The test report number has an "A," so it would be a

09:58:07 19 revision to the original report. August 25th, 2011.

09:58:11 20 Q. And can you please point the Court to a spot in the report

09:58:20 21 itself where the changes are documented?

09:58:22 22 A. Yes. On the third page, the title of the page is Revision

09:58:28 23 Control Log for TR-P31081-01, where it notes a revision "A" on

09:58:39 24 8/25/2011. Under the description of the change, "change

09:58:47 25 product to NEU Security Services from Gibraltar."

09:58:54 1 Q. Okay. If you could please turn to Exhibit K-20.

09:58:58 2 A. Yes.

09:59:03 3 Q. And identify that document for me, please.

09:59:06 4 A. It is a crash test report for Gibraltar Cable Barrier

09:59:09 5 Systems' K12 cable restraint barrier, 50 feet.

09:59:14 6 Q. All right. Would you please look at Exhibit 20 -- K-23

09:59:18 7 and K 24 and explain these documents -- and identify and

09:59:22 8 explain these documents for the Court.

09:59:25 9 A. K-23 is the report change notice for report

09:59:34 10 TR-P30026-01-NC made by Michael McBride to change the name from

09:59:49 11 Gibraltar to NSS cable restraint barrier, 50 feet.

09:59:57 12 Q. And does the Exhibit K-24 report reflect the change

10:00:04 13 reflected by Michael McBride on August 25th, 2011?

10:00:09 14 A. Yes.

10:00:09 15 Q. And where in the report can we confirm that?

10:00:12 16 A. On the third page -- or yeah. Actually, on this one it's

10:00:16 17 the second page. The revision control log, revision A on

10:00:27 18 8/25/2011, "change product to NEU Security Services from

10:00:31 19 Gibraltar."

10:00:32 20 Q. Okay, Mr. Peng. I want to see if we could summarize what

10:00:39 21 led there to being two sets of KARCO's test reports for the

10:00:44 22 exact same crash test and the exact same products, the original

10:00:48 23 set of reports having Gibraltar's name on them and the

10:00:50 24 subsequent set having NEU Security Services' name on them.

10:00:54 25 So, given your knowledge of KARCO's records and its

10:00:59 1 business activities, can you please summarize for the Court in
10:01:02 2 your own words how it came to be that NEU Security's name ended
10:01:06 3 up on amended versions of crash test reports for the M50 P2
10:01:12 4 cable crash fence and the 24-foot and 50-foot cable restraint
10:01:17 5 barriers?

10:01:18 6 A. I guess, you know, Bill and Stephen were working together,
10:01:34 7 and we conducted the crash tests on behalf of them. And at one
10:01:39 8 point in time, NSS asked for a name change to the reports
10:01:47 9 that -- that we complied with.

10:01:51 10 Q. Okay. And, specifically, when you say that NSS asked
10:01:55 11 for -- requested that the change be made, you're taking that
10:02:01 12 information from the report change notices that we reviewed
10:02:04 13 today; is that correct?

10:02:05 14 A. Yes. That is correct.

10:02:06 15 Q. And those changes are the ones that were requested by
10:02:08 16 Michael McBride on August 25th, 2011?

10:02:11 17 A. That is correct.

10:02:12 18 Q. And all those changes asked for were that Gibraltar's name
10:02:15 19 essentially be taken out of the report and -- out of the three
10:02:20 20 reports and substitute NSS's name in its place; is that right?

10:02:24 21 A. That's correct.

10:02:24 22 ... its ownership of the product.

10:02:27 23 Q. But the -- the fact that you guys, at Michael McBride's
10:02:32 24 request, put NEU Security's name on the top of these crash test
10:02:36 25 reports does not mean that KARCO thinks that NSS owns these

10:02:41 1 products, does it?

10:02:41 2 A. No.

10:02:55 3 (Audio stopped)

10:02:55 4 MS. TAYLOR: Do you want me to clarify for the Court
10:02:57 5 the exhibit numbers again?

10:02:59 6 THE COURT: Yeah. I think what you said was that
10:03:02 7 when Mr. Peng refers to an exhibit indicated for the deposition
10:03:09 8 as K-1 through K-24, inclusive, that relates to the exhibits
10:03:16 9 for this hearing, Plaintiffs' Exhibits 100 through 124,
10:03:21 10 inclusive.

10:03:24 11 MS. TAYLOR: 101 through 124.

10:03:28 12 THE COURT: 101 through 124.

10:03:28 13 MS. TAYLOR: So K-1 matches to 101, K-2 matches to
10:03:33 14 102.

10:03:33 15 THE COURT: Okay. Then I think we've got it.

10:03:37 16 MS. TAYLOR: That's all we have for Mr. Peng.

10:03:39 17 THE COURT: All right. Ms. Ghavimi, do you want to
10:03:41 18 present any additional clips of Mr. Peng at this time?

10:03:44 19 MS. GHAVIMI: Your Honor, we do not have clips. I
10:03:47 20 can read into the record counter-designations, if that's
10:03:50 21 permissible.

10:03:50 22 THE COURT: You may do that. You may do that at this
10:03:53 23 time.

10:03:54 24 MS. GHAVIMI: Okay. The first --

10:03:54 25 THE COURT: Now, you're going to have to pull that

10:03:55 1 microphone down, and you're going to have to speak into the
10:03:58 2 microphone so that the court reporter and I can hear you.

10:04:02 3 **CROSS-EXAMINATION**

10:04:02 4 **BY MS. GHAVIMI:**

10:04:02 5 Okay. The first counter-designation I have is page
10:04:08 6 42 -- actually, I apologize. Go back. Page 41, line 21. The
10:04:24 7 question by my Ms. Taylor:

10:04:25 8 "Mr. Peng, are aware of whether Stephen Neusch or
10:04:30 9 anyone at NSS represented to KARCO that it now owned these
10:04:34 10 products or was the original designer of these products?"

10:04:43 11 I am skipping over intervening objections.

10:04:45 12 The next -- the answer.

10:04:51 13 MS. TAYLOR: Objection. You skipped the rest of my
10:04:53 14 question.

10:04:54 15 MS. GHAVIMI: Okay. The rest of the question is at
10:04:56 16 page 42, line 2: "I asked whether -- whether you knew if you
10:05:01 17 have knowledge of whether Stephen Neusch or NEU Security
10:05:04 18 Services made a representation to anyone at KARCO about whether
10:05:08 19 they owned these products."

10:05:12 20 Line 9, "THE WITNESS: Yeah. I mean, I don't -- I
10:05:19 21 don't believe that anybody -- he did not make a representation
10:05:22 22 that he specifically owned or designed the products.

10:05:27 23 Line 13, question my Ms. Taylor:

10:05:30 24 "You don't know -- you probably don't know one way or
10:05:33 25 the other, do you?"

10:05:38 1 Answer line 15: "No. Yeah. We don't know. I mean,
10:05:43 2 we are -- we are just the test lab that -- you know, we get
10:05:46 3 requested to test and we don't get too involved with the design
10:05:51 4 or -- or I guess ownership of the products."

10:06:13 5 MS. GHAVIMI: Next designation, page 59, line 6 by
10:06:21 6 Ms. Ghavimi:

10:06:23 7 "Okay. Mr. Peng, I believe you said at the end of
10:06:25 8 your direct questioning that KARCO is just a -- an engineering
10:06:30 9 firm; is that correct -- do you recall that?"

10:06:35 10 Answer, line 10: "Yes. That we are a -- a test
10:06:38 11 lab."

10:06:40 12 Line 11, question by Ms. Ghavimi: "And I believe you
10:06:43 13 also said that KARCO doesn't delve into who designs a product
10:06:48 14 and who owns a product. Do you recall that?"

10:06:52 15 Line 14: "A. Yes, I do."

10:06:55 16 Line 15, question by Ms. Ghavimi: "Okay. So do you
10:06:59 17 ask your customers whether they own a product?"

10:07:04 18 Line 17: Objection.

10:07:07 19 Line 18: "THE WITNESS. So when a customer
10:07:11 20 approaches us to test a product, we believe that they own the
10:07:15 21 product. We don't -- we don't check into, like, patents or --
10:07:21 22 or something like that."

10:07:26 23 Line 22, question by Ms. Ghavimi: "Do you just
10:07:29 24 simply take their word for it?"

10:07:31 25 Line 24: Objection.

10:07:32 1 Line 25: "THE WITNESS: So I guess in -- in the
10:07:36 2 course of the business that we do, we -- we -- we test products
10:07:41 3 for third parties as well that don't own their products. For
10:07:45 4 example, the majority of our business will test for the federal
10:07:49 5 government that tests for the automotive industry, like Mazda,
10:07:53 6 for example. So we're testing for the federal government
10:07:56 7 and -- but we're testing Mazda's product. So I guess the
10:08:01 8 federal government doesn't own the product, but we're testing
10:08:04 9 it on behalf of the federal government. And so we do quite a
10:08:07 10 bit of testing that -- for either the manufacturers of the
10:08:13 11 product or a third party wishing to test a product."

10:08:23 12 Last designation, line 68 -- I'm sorry -- page 68,
10:08:27 13 line 21:

10:08:29 14 Question by Ms. Ghavimi: "So if the crash test
10:08:32 15 states in there that NSS did the installation, you would
10:08:38 16 believe that to be a true statement?

10:08:41 17 Answer: "I would."

10:08:42 18 MS. GHAVIMI: Nothing further.

10:08:47 19 THE COURT: Thank you. Anything further from the
10:08:49 20 plaintiff?

10:08:50 21 MS. TAYLOR: No, Your Honor.

10:08:51 22 THE COURT: You may proceed with your next
10:08:53 23 evidentiary presentation.

10:08:55 24 MR. CONNOR: Plaintiffs call Mr. Stephen Neusch.

10:08:58 25 (Witness sworn)

10:09:36 1 **STEPHEN NEUSCH,**

10:09:36 2 having been first duly sworn, testified as follows:

10:09:36 3 **DIRECT EXAMINATION**

10:09:36 4 **BY MR. CONNOR:**

10:09:36 5 Q. Good morning, Mr. Neusch.

10:09:38 6 A. Good morning.

10:09:39 7 Q. The notebooks in front of you, there are four of them,

10:09:45 8 they've got tabs with numbers on them and behind each number is

10:09:48 9 a document. I'm going to ask you to turn to a particular

10:09:53 10 exhibit number or tab number. And if -- if we can do that

10:09:59 11 quickly through this, we'll get through this as efficiently as

10:10:03 12 possible.

10:10:03 13 A. Sure.

10:10:04 14 Q. Let's first start with tab 9, please. That's going to be

10:10:08 15 in the -- there's four volumes there, so you'll have to look

10:10:12 16 and see which one is which.

10:10:25 17 Do you recognize those as defendants' interrogatory

10:10:31 18 responses?

10:10:31 19 A. Yes.

10:10:32 20 Q. You participated in preparing those?

10:10:34 21 A. Yes.

10:10:34 22 Q. And you reviewed them before they were served to the

10:10:37 23 plaintiffs in this case?

10:10:38 24 A. Yes.

10:10:38 25 Q. And they were correct?

10:10:41 1 A. Yes.

10:10:41 2 Q. Turn to interrogatory number 3. That's going to be on the

10:10:46 3 fifth page, please.

10:10:49 4 A. (Complies)

10:10:49 5 Q. And what we're going to look at is the response. And

10:10:52 6 under the heading --

10:10:53 7 A. There's no page numbers.

10:10:55 8 Q. That's right. There aren't. But just count to the fifth

10:10:58 9 page, if you would, Mr. Neusch, and we'll move as quickly as we

10:11:04 10 can. There's a heading on that page that says Crash Test's DOD

10:11:11 11 List. Do you see that?

10:11:12 12 A. Yes.

10:11:13 13 Q. And you see the first line that says: Defendant NEU

10:11:16 14 Security Services LCC had crash tests performed for their M50

10:11:22 15 P1 K12 cable restraint barrier, and it goes on to list the

10:11:26 16 cable restraint barrier and the cable crash fences?

10:11:29 17 A. Yes.

10:11:29 18 Q. That's not true, is it, Mr. Neusch?

10:11:32 19 A. No. It's true.

10:11:33 20 Q. We just heard Mr. Peng testify that those tests were

10:11:38 21 performed by Gibraltar and NSS called KARCO and had them change

10:11:45 22 the name on the report. Did you hear Mr. Peng testify about

10:11:49 23 that?

10:11:57 24 A. There was a lot of stuff that was testified to.

10:12:00 25 One, you-all keep saying Michael McBride is an NSS

10:12:02 1 employee. He was a Gibraltar employee. Two, we did perform
10:12:04 2 the test, as we did the installation, we managed it, we
10:12:08 3 coordinated it. We were the only ones on site. Gibraltar
10:12:12 4 wasn't even there. They weren't a representative for those
10:12:15 5 tests.

10:12:15 6 Q. Mr. Neusch? You heard Mr. Peng testify that --

10:12:17 7 A. He testified that he changed the name.

10:12:18 8 Q. I'm sorry, Mr. Neusch. Let me finish my question before
10:12:21 9 you answer.

10:12:21 10 A. Okay.

10:12:21 11 Q. You heard Mr. Peng testify that those tests were performed
10:12:25 12 for Gibraltar, did you not?

10:12:27 13 A. And then he changed the name to NEU Security Services, the
10:12:31 14 proper designation.

10:12:32 15 Q. And you directed Mr. McBride to contact KARCO to make that
10:12:36 16 change in the name only, didn't you?

10:12:40 17 A. In the name only? What does that mean?

10:12:42 18 Q. From "Gibraltar" to "NEU Security Services." You directed
10:12:44 19 Mr. McBride to make that change?

10:12:48 20 A. I don't understand the question.

10:12:50 21 Q. Did you or did you not --

10:12:51 22 A. Did I direct him? I don't recall. That was four years
10:12:54 23 ago, five years ago or so.

10:12:56 24 Q. You don't recall whether you asked Mr. McBride --

10:12:59 25 A. Me personally? No.

10:13:00 1 Q. Let me finish my question, please, sir.

10:13:03 2 A. Okay.

10:13:03 3 Q. Do you recall directing Mr. McBride to contact KARCO

10:13:08 4 engineering and request they change the name on the test

10:13:13 5 reports for these products from "Gibraltar" to "NEU Security

10:13:18 6 Services"?

10:13:20 7 A. I don't recall, no.

10:13:21 8 Q. If you'll scroll down a little farther on that same

10:13:29 9 interrogatory response to the next page, do you see the heading

10:13:33 10 that says Dates First Manufactured/Sold?

10:13:36 11 A. Where is this?

10:13:37 12 Q. The next page halfway down under the heading that says

10:13:42 13 Dates First Manufactured/Sold?

10:13:44 14 A. Yes.

10:13:45 15 Q. Okay. Four lines down, it says "Defendants." And the

10:13:52 16 defendants in this case are NEU Security Services, you

10:13:55 17 personally, and Black Security Products, correct?

10:13:59 18 A. Correct.

10:13:59 19 Q. And it says in that sentence, "Defendants have been

10:14:05 20 selling wedge barriers since at least as early as 2010 and have

10:14:09 21 manufactured and sold, in whole or in part, M50 finger wedge

10:14:16 22 barriers since at least as early as December 26, 2012."

10:14:20 23 Did I read that correctly?

10:14:22 24 A. Yes. That's what it says.

10:14:23 25 Q. That's not true, is it, sir?

10:14:25 1 A. Well, the December 26th, 2012 is the contract date for
10:14:29 2 Fort Sam Houston 1. In preparation they put the wrong date in
10:14:33 3 there. It's supposed to be Fort Sam Houston 2, which they have
10:14:35 4 the new date for.

10:14:36 5 Q. BSP, or Black Security Products, Mr. Neusch, has never
10:14:41 6 manufactured a wedge barrier, has it?

10:14:43 7 A. No, it hasn't.

10:14:44 8 Q. NSS has never itself manufactured a wedge barrier -- NEU
10:14:50 9 Security Services has never manufactured a wedge barrier
10:14:55 10 itself. True?

10:14:56 11 A. No. That's incorrect.

10:14:57 12 Q. Has NEU Security Services ever manufactured a wedge
10:15:02 13 barrier without the authorization and involvement of Gibraltar?

10:15:08 14 A. Well, first, NSS wouldn't need the authorization from
10:15:11 15 Gibraltar because we don't need authorization from Gibraltar to
10:15:15 16 manufacture our own products. Secondly, we have manufactured
10:15:18 17 many wedge barriers.

10:15:20 18 Q. I'm going to repeat my question, and tell me if this is
10:15:24 19 something that you can answer with a "yes" or "no."

10:15:27 20 Has NEU Security Services, Mr. Neusch, ever
10:15:31 21 manufactured itself, without the authorization and involvement
10:15:34 22 of Gibraltar, an M50 finger wedge barrier?

10:15:41 23 A. You've asked multiple questions. How can I give you a
10:15:45 24 "yes" or "no?" You want to give me an actual question?

10:15:48 25 THE COURT: No. He gave you an actual question. It

10:15:49 1 was understandable to the court. Listen to his question and
10:15:52 2 answer the question.

10:15:53 3 THE WITNESS: Okay.

10:15:55 4 A. Well, you asked me two questions. Can you repeat it?

10:16:00 5 Q. What wedge barriers has NEU Security Services ever itself
10:16:07 6 manufactured without the involvement and authorization of
10:16:11 7 Gibraltar, Mr. Neusch?

10:16:13 8 A. Well, we've never had the authorization of Gibraltar,
10:16:18 9 necessarily, but the wedge barrier that's in question, the
10:16:21 10 finger wedge barrier, we have manufactured. And Gibraltar's
10:16:24 11 generally been involved because we were a partner with
10:16:26 12 Gibraltar this entire time, up until this last year.

10:16:29 13 Q. Up until February of 2015, correct?

10:16:32 14 A. That is correct.

10:16:33 15 Q. Okay. So I'm going to ask the same question one more
10:16:37 16 time, sir, if you can answer the question for me, because this
10:16:41 17 is -- you understand this is important -- the question of
10:16:44 18 whether manufacturing was ever done by NEU Security Services is
10:16:49 19 an important question before us today?

10:16:52 20 A. Yes.

10:16:53 21 MS. GHAVIMI: Objection, Your Honor. Counsel is
10:16:55 22 testifying and his question has been asked and answered.

10:16:58 23 THE COURT: No. It has never been answered. That
10:16:59 24 objection is overruled. And if it has, I'm going to let him
10:17:03 25 answer it again because I didn't understand the answer.

10:17:09 1 Q. (BY MR. CONNOR) Has NEU Security Services ever
10:17:13 2 manufactured itself an M50 finger wedge barrier without the
10:17:20 3 authorization or involvement of Gibraltar?

10:17:24 4 A. We have manufactured a finger wedge barrier. We have
10:17:28 5 manufactured it in involvement with Gibraltar because that's
10:17:32 6 how we worked.

10:17:32 7 So, for example, to explain this the best way I can,
10:17:36 8 NEU Security Services had the idea and the -- to make a wedge
10:17:41 9 barrier. We approached Gibraltar to do the fabrication of the
10:17:46 10 steel. NSS has always done the more critical side of the
10:17:50 11 manufacturing and the automated -- the automated side. So a
10:17:54 12 wedge barrier is an AVP -- that stands for Active Vehicle
10:17:59 13 Barrier. NEU Securities always did the active aspect of the
10:18:02 14 manufacturing.

10:18:03 15 So, for example, like your phone, Gibraltar did the
10:18:05 16 structure. We did the actual computing part of it and we
10:18:08 17 actually had the design that we took to Gibraltar and said we
10:18:11 18 wanted a finger wedge. Here's how we want it. And all the
10:18:14 19 critical components that made that product what it is was NEU
10:18:17 20 Security's design. And we brought it to Gibraltar, they did
10:18:20 21 the steel manufacturing, we did the automated manufacturing.

10:18:23 22 Q. So there's a distinction that you're making between
10:18:26 23 manufacturing the product and manufacturing the ancillary
10:18:30 24 systems that go into the installation; is that correct?

10:18:33 25 A. No. What I'm saying is anyone that manufactures anything

10:18:37 1 outsources certain parts of the manufacturing or where they get
10:18:40 2 the parts. No one does a complete system in-house and does
10:18:44 3 everything on their own. Gibraltar currently doesn't either.
10:18:47 4 They employ currently some of my subcontractors that they found
10:18:49 5 through me to do their automation. So the whole system as a
10:18:53 6 whole, you outsource the parts to the specialties that do that
10:18:55 7 part. We outsource the fabrication of the steel, the welding.
10:18:59 8 They're a weld shop. That's what they did.

10:19:02 9 Q. So has NEU Securities Services ever manufactured the steel
10:19:10 10 portion -- the heavy, strong barrier portion of a wedge
10:19:17 11 barrier, an M50 wedge barrier -- finger wedge barrier?

10:19:22 12 A. Well, there was --

10:19:22 13 Q. Let me finish my question, please.

10:19:24 14 A. I thought you were done.

10:19:29 15 Q. I'm going to start over, okay, because I want you to
10:19:31 16 follow me.

10:19:32 17 Has NEU Security Services ever manufactured the steel
10:19:40 18 portion of an M50 finger wedge barrier?

10:19:44 19 A. Well, there was a time where Gibraltar refused and stopped
10:19:49 20 manufacturing that portion, so we outsourced it to other
10:19:52 21 companies.

10:19:53 22 Q. So NSS, or NEU Security Services, has never itself
10:19:59 23 manufactured an M50 finger wedge barrier, putting aside the
10:20:04 24 automation system?

10:20:05 25 A. Well, the automation is most of the work.

10:20:08 1 Q. I'm sorry. What did you say?

10:20:09 2 A. The automation is most of the work, and Bill Neusch always

10:20:11 3 said he didn't want to do it because it was too complicated and

10:20:15 4 too much liability. We've always done the automation side,

10:20:17 5 which to me you're making assumptions or you're making

10:20:20 6 statements that aren't correct. The automation side of it, the

10:20:25 7 active part of the active vehicle barrier is what makes it

10:20:28 8 active. That's the most complicated part of the manufacturing

10:20:33 9 process.

10:20:33 10 MR. CONNOR: I'm going to object and move to strike

10:20:36 11 the nonresponsive portion of that testimony, Your Honor, and

10:20:37 12 I'd like to ask the question.

10:20:38 13 THE COURT: Well, your objection is sustained, but

10:20:40 14 I'm not going to strike it. I will consider it. But you may

10:20:43 15 rephrase your question.

10:20:44 16 Mr. Neusch, let me remind you again, listen to his

10:20:47 17 question and answer his question.

10:20:50 18 THE WITNESS: Yes, sir.

10:20:51 19 THE COURT: If your lawyer wants to ask you for

10:20:53 20 further elaboration or additional statements, your lawyer will

10:20:56 21 have an opportunity when he is through to ask you additional

10:21:01 22 questions. This will go a lot faster if you will listen and

10:21:04 23 answer his questions.

10:21:06 24 THE WITNESS: Yes, sir.

10:21:08 25 Q. (BY MR. CONNOR) Mr. Neusch, you understand that the

10:21:15 1 automation or control aspects of the four disputed products are
10:21:22 2 not at issue?

10:21:25 3 A. No. I don't understand that.

10:21:26 4 Q. The -- do you understand the disputed products to be the
10:21:32 5 structural steel, as you've referred to it, component that is
10:21:38 6 the physical barrier?

10:21:39 7 A. Absolutely not. They're required by even the crash
10:21:43 8 testing that you-all put up on the screen to be automated
10:21:46 9 during the crash test. It cannot be sold without it being
10:21:49 10 automated. You cannot have an active vehicle barrier without
10:21:52 11 the active part of it. For example, I mean, you have to
10:21:57 12 actually make it automate when you crash test it. You can't
10:22:00 13 just go put the structure up there. It's a requirement. It's
10:22:03 14 the active part of the active vehicle barrier.

10:22:06 15 Q. Perhaps we can cut to the quick here, Mr. Neusch. Would
10:22:11 16 you be okay with the Court entering an order that would permit
10:22:18 17 you to make and distribute and sell the automation part of
10:22:25 18 these four disputed products, but not allow you to have
10:22:31 19 manufactured the finger wedge barrier steel portion, the cable
10:22:37 20 restraint barrier steel portion, and the crash fence steel
10:22:42 21 portion, those portions that Gibraltar manufactures?

10:22:45 22 A. Sir, you're saying Gibraltar wouldn't do the automated
10:22:49 23 side when they sold it and they would have me do the automated
10:22:52 24 side from here on out?

10:22:53 25 Q. I'm suggesting --

10:22:54 1 A. Is that what you're suggesting?

10:22:56 2 Q. I'm asking you: Would you be okay with the Court entering

10:22:59 3 an order that prohibited NEU Security Services, you personally,

10:23:03 4 and Black Security Products from manufacturing or having

10:23:08 5 manufactured or offering to sell the steel portion of these

10:23:12 6 four disputed products, but allowing you to make, sell,

10:23:19 7 distribute, and install the automation?

10:23:23 8 A. I can't answer that question because it's overly broad.

10:23:25 9 For example, not all these -- we're talking about four

10:23:29 10 different products. One of them is not automated. Secondly,

10:23:32 11 is this a proposal for settlement because are you saying we

10:23:35 12 would do the automation for Gibraltar? Like I don't understand

10:23:39 13 if --

10:23:39 14 Q. Let me put it to you --

10:23:40 15 A. Obviously, the two -- the restraint barriers I think

10:23:43 16 Gibraltar has no part of it. They shouldn't do anything. I

10:23:46 17 could negotiate a settlement with them on the wedge barrier if

10:23:51 18 you like.

10:23:51 19 Q. Can we look at these four disputed products, Mr. Neusch,

10:23:55 20 with a line down the middle, the structural portion and the

10:24:00 21 automation and control portion. Does that make sense?

10:24:04 22 A. Sure.

10:24:05 23 Q. Would you be okay if the Court entered an order that

10:24:11 24 allowed you to do the control and automation portion of these

10:24:16 25 four products but did not permit you to do the structural

10:24:23 1 portion?

10:24:25 2 A. No. Because these are four different products, and two of

10:24:30 3 the products Gibraltar has no rights to whatsoever because we

10:24:34 4 designed, did everything. They've even given it up and said

10:24:39 5 they want no part of it. There is -- you can't lump them all

10:24:42 6 together, and that's why I keep asking.

10:24:44 7 Q. Which ones would you agree --

10:24:45 8 A. So just to make it simple, no, I would not.

10:24:47 9 Q. Which of the four products -- you know what they are,

10:24:50 10 right?

10:24:50 11 A. Yes, I do.

10:24:51 12 Q. Okay. Which of the four disputed products would you be

10:24:55 13 willing to abide by a court order that prohibited you from

10:25:02 14 making, selling, having manufactured, distributing or selling

10:25:07 15 the structural portion of it?

10:25:10 16 A. I would abide by any court order, but I believe these

10:25:15 17 products to be mine.

10:25:15 18 Q. All four of them?

10:25:16 19 A. That's correct. I believe I have more rights to some than

10:25:19 20 others, but our contention is that Gibraltar's has overreached

10:25:24 21 and tried to steal these products and tried to make money off

10:25:26 22 of them selling them and obviously doing what they do.

10:25:29 23 Q. So just to be clear, Mr. Neusch, it's your contention that

10:25:35 24 NEU Security Services and BSP and you personally should be

10:25:42 25 permitted to manufacture the steel portion of all four disputed

10:25:47 1 products?

10:25:48 2 A. Well, I don't think me personally should even be in here
10:25:52 3 because I have no personal avenue to Gibraltar. But the -- I
10:25:55 4 believe that, yes, NEU Security Services and BSP should.

10:25:59 5 That's correct.

10:26:00 6 Q. Please turn to Exhibit 107, and keep that one open because
10:26:09 7 we're going to come right back to it. It's going to be over to
10:26:23 8 your right in volume number 3.

10:26:24 9 A. Are these copies of the same thing?

10:26:26 10 Q. No they're not. They're all different.

10:26:26 11 A. It's the same numbers.

10:26:26 12 Q. I'm sorry. Volume 4. Look for volume 4.

10:26:32 13 MR. CONNOR: May I approach, Your Honor?

10:26:32 14 THE COURT: Let me remind the lawyers you don't have
10:26:34 15 to ask to approach. You may just approach the witness,
10:26:37 16 conclude your business with the witness, and then return to the
10:26:40 17 podium.

10:26:53 18 Q. (BY MR. CONNOR) Please look at Exhibit Number 107.

10:26:56 19 I asked you a few minutes ago if you remembered -- or
10:27:00 20 you said you didn't remember, but I asked you if you directed
10:27:03 21 Mr. McBride to contact KARCO and have the name changed on those
10:27:07 22 crash reports.

10:27:09 23 Do you recognize this e-mail from Mr. McBride dated
10:27:14 24 August the 25th, 2011, the same day Mr. Peng testified they
10:27:19 25 received the instruction, the request to change the name?

10:27:22 1 A. I'm reading it now. Yes, sir.

10:27:24 2 Q. Okay. And what does it say there under the heading KARCO

10:27:28 3 Updated Test Results? You see where it says, "Kelsey, I will

10:27:32 4 send to Stephen for his review"?

10:27:38 5 A. Yes.

10:27:38 6 Q. So there is Mr. McBride letting KARCO know that he was

10:27:42 7 going to clear this with you.

10:27:44 8 A. Yes. A Gibraltar employee saying he's going to clear it

10:27:48 9 with me.

10:27:49 10 Q. You see Mr. McBride's e-mail there at very top? What is

10:27:52 11 his e-mail address, Mr. Neusch?

10:27:54 12 A. MichaelMcBride@NEUSecurity.com. But he was a Gibraltar

10:28:01 13 employee, as I stated.

10:28:02 14 Q. Let's go to Exhibit Number 90, the interrogatory response,

10:28:05 15 please. You can close that one and we'll go back to where we

10:28:08 16 were.

10:28:16 17 Mr. Neusch, Black Security Products had no business

10:28:19 18 activity between June 14th -- I'm sorry -- June of 2014 and

10:28:24 19 July 2015, correct?

10:28:26 20 A. What was those dates?

10:28:31 21 Q. June 2014 --

10:28:33 22 A. Okay.

10:28:34 23 Q. -- when you founded Black Security Products --

10:28:36 24 A. Got you.

10:28:36 25 Q. -- and July of last year, 2015?

10:28:40 1 A. That's correct. I believe BSP started doing stuff around
10:28:44 2 July of last year.

10:28:45 3 Q. And with respect to the disputed products, no defendant
10:28:52 4 has made any of them since February of 2015, correct?

10:29:02 5 A. I don't know when the last time we made one is.

10:29:08 6 Q. I didn't ask you when the last time was. I asked you to
10:29:11 7 confirm the truth of the statement, that no defendant has made
10:29:14 8 any disputed product since February of 2015.

10:29:19 9 A. Okay. I don't know.

10:29:20 10 Q. Do you see that same page where we were under the headings
10:29:37 11 All Dates to Whom/Project?

10:29:40 12 A. Yes.

10:29:40 13 Q. Do you see the last sentence in that paragraph? Follow
10:29:45 14 along with me, please. "Defendants have not manufactured or
10:29:48 15 sold any of these products after February 4th, 2015." Is that
10:29:55 16 statement still true?

10:30:00 17 A. As far as I'm aware. I know we have a pending sale for a
10:30:09 18 restraint barrier. I don't know if it's been memorialized yet
10:30:12 19 or not.

10:30:12 20 Q. For one of the disputed products, the restraint barrier?

10:30:15 21 A. That's correct.

10:30:15 22 Q. And who is that pending sale to?

10:30:17 23 A. A contractor.

10:30:18 24 Q. Do you know their name?

10:30:20 25 A. I think it's Alamo One Fort Sam Houston.

10:30:23 1 Q. Okay. And when was that project bid?

10:30:26 2 A. That project was bid a long time ago.

10:30:29 3 Q. When?

10:30:31 4 A. I don't know. I would have to look at the paperwork.

10:30:34 5 Q. Was it bid before the termination notice?

10:30:39 6 A. I believe so, yeah.

10:30:44 7 Q. The termination agreement that you signed was February

10:30:48 8 2015, right?

10:30:49 9 A. Yes.

10:30:52 10 Q. And you just confirmed that, since February of 2015, NSS

10:31:09 11 and BSP have not sold any disputed products. Is that true?

10:31:17 12 A. Have not sold?

10:31:19 13 Q. Made, sold, offered for sale?

10:31:22 14 A. I said, other than the restraint barrier, the restraint

10:31:25 15 barrier we may have -- I mean, I don't know if the contract has

10:31:29 16 been executed yet, but I know we have a contract in the works

10:31:33 17 for one.

10:31:34 18 Q. So does that make the statement in your interrogatory

10:31:37 19 response, that defendants have not manufactured or sold any of

10:31:42 20 these products after February 4th, 2015 untrue?

10:31:49 21 A. No. As far as I'm aware, we have not executed a contract

10:31:53 22 on it, so currently we have no sales on the restraint barrier.

10:31:56 23 I'm just letting you know that I know we have one coming up.

10:31:59 24 Q. You testified a minute ago that Black Security Products

10:32:10 25 didn't have any activity until July of 2015, right?

10:32:16 1 A. That's correct.

10:32:17 2 Q. So they couldn't have made any of these products before

10:32:20 3 the termination notice, right?

10:32:22 4 A. That's correct.

10:32:23 5 Q. So has NSS ever manufactured any of the disputed products

10:32:31 6 prior to February the 4th, 2015 without the authorization or

10:32:37 7 involvement of Gibraltar?

10:32:43 8 A. We have manufactured those products with the involvement

10:32:46 9 of Gibraltar. We were partners with them prior to that date.

10:32:50 10 They have not done anything with the involvement of us.

10:32:53 11 Q. And that was because there was an exclusive agreement in

10:32:57 12 place between Gibraltar and NSS that was terminated February of

10:33:01 13 2015, correct?

10:33:03 14 A. There was an exclusive agreement between NSS and

10:33:07 15 Gibraltar. That's correct.

10:33:08 16 Q. And it was terminated in February of 2015?

10:33:12 17 A. Well, they tried to terminate it, but then they breached

10:33:18 18 that termination in the subsequent -- the prior contract.

10:33:21 19 Q. Mr. Neusch, did you sign a termination agreement in

10:33:25 20 February of 2015?

10:33:27 21 A. I did.

10:33:28 22 Q. Turn to the next page, the response to interrogatory

10:33:33 23 number 4.

10:33:35 24 A. Okay.

10:33:35 25 Q. The second paragraph about halfway down, starts with a

10:33:40 1 sentence that starts, "Defendants do not represent that their
10:33:43 2 products are manufactured by or affiliated with any party other
10:33:49 3 than Defendants." That statement's not true, is it?
10:33:56 4 A. Which one? Read it again. Which line?
10:33:59 5 Q. "Defendants do not represent that their products are
10:34:04 6 manufactured by or affiliated with any party other than
10:34:10 7 Defendants."
10:34:12 8 A. Not anymore, because our contract with Gibraltar was
10:34:14 9 terminated.
10:34:15 10 Q. Okay. That -- that wasn't true even before the
10:34:20 11 termination -- I'm sorry -- hasn't been true since the
10:34:25 12 termination, is it?
10:34:26 13 A. It is true.
10:34:27 14 Q. Turn to PX-15, please.
10:34:37 15 A. To where?
10:34:38 16 Q. Fifteen.
10:34:55 17 A. Okay.
10:34:56 18 Q. This is a Black Security submittal to -- on the Fort
10:35:02 19 Buchanan product to Purgatory Fence?
10:35:04 20 A. Yes.
10:35:04 21 Q. Dated December of 2015?
10:35:09 22 A. That's correct.
10:35:10 23 Q. I would like you to turn, please, to the third to last
10:35:18 24 page -- fourth to last page behind the tab that says -- behind
10:35:23 25 the pages that says Certification.

10:35:28 1 A. Okay.

10:35:29 2 Q. And right behind that is a certification letter. Do you

10:35:32 3 recognize that?

10:35:33 4 A. I do.

10:35:33 5 Q. And that's a certification letter to Gibraltar.

10:35:37 6 A. No, it's not -- it is a Gibraltar certification letter.

10:35:41 7 That's correct.

10:35:42 8 Q. Certifications are important in your business, are they

10:35:49 9 not?

10:35:49 10 A. They are.

10:35:49 11 Q. And a product that's been certified, it's been crash

10:35:53 12 tested as we heard Mr. Peng explain, and determined to meet

10:35:57 13 certain standards for performance makes those products

10:36:03 14 valuable. Would you agree?

10:36:05 15 A. Yes.

10:36:05 16 Q. And the engineering and the testing and the manufacturing

10:36:11 17 that goes into those products to ensure that they meet those

10:36:15 18 standards and become a certified product, make those products

10:36:19 19 valuable. Would you agree?

10:36:22 20 A. There's a lot that makes products valuable. But, yes,

10:36:25 21 that makes the products valuable.

10:36:27 22 Q. It's very difficult, would you agree, to sell these

10:36:32 23 barrier products without a certification?

10:36:40 24 A. A certification definitely helps in the sale of products.

10:36:44 25 That's correct. But --

10:36:45 1 Q. Now, Mr. Neusch. If you'll turn now to --

10:36:47 2 A. No. Hold on. You showed a crash test certificate from

10:36:52 3 Gibraltar as part of a BSP submittal that was post the February

10:36:56 4 2015 date, correct? And Gibraltar doesn't own this

10:37:00 5 certification, Betafence does. And when NSS was doing this

10:37:04 6 project, we had a quote from Betafence Fence, per my

10:37:08 7 termination agreement, to supply this product. So this has

10:37:10 8 nothing to do with your client. But they did get the contract

10:37:13 9 terminated and interfered in my contract and my business,

10:37:17 10 costing me money on this very contract.

10:37:20 11 Q. Mr. Neusch, the question I asked you was whether the

10:37:23 12 statement in your interrogatory response, that Defendants' do a

10:37:27 13 not present their products as affiliated with anybody other

10:37:33 14 than Defendants, that statement, as we've just seen in the BSP,

10:37:38 15 the Black Security Products Purgatory Fence submittal is --

10:37:42 16 A. No. You're lying.

10:37:42 17 Q. I'm sorry, Mr. Neusch. Please let me finish my

10:37:45 18 question --

10:37:45 19 A. Okay.

10:37:45 20 Q. -- and then you can call me a liar.

10:37:48 21 A. Okay.

10:37:48 22 Q. The certification that's right there in the Black Security

10:37:52 23 Products submittal is in the name of Gibraltar, correct?

10:37:58 24 A. Correct.

10:37:58 25 Q. And you submitted that to Purgatory Fence in December of

10:38:04 1 2015, correct?

10:38:06 2 A. Correct.

10:38:07 3 Q. Okay. So it's not true that Defendants never affiliate
10:38:14 4 their products with anybody other than Defendants. You
10:38:20 5 affiliated your product here with Gibraltar, didn't you?

10:38:22 6 A. No. There's -- okay. First off, this is not one of the
10:38:26 7 four products in question. So you're manipulating the
10:38:29 8 situation. This is a completely separate product on this
10:38:31 9 project.

10:38:32 10 Second, BSP has never claimed this to be its product.

10:38:35 11 We were a contractor on this job, and we went to Betafence to
10:38:38 12 provide this gate. Betafence bought this certification from
10:38:43 13 Gibraltar, and they're the ones that provided it -- that were
10:38:46 14 going to provide the product until Gibraltar got it terminated.
10:38:49 15 This is not -- nowhere has BSP represented that this is our
10:38:53 16 product. This isn't our product. This isn't one of the four
10:38:57 17 products that are in question. So you're manipulating and
10:39:00 18 trying to commingle the products.

10:39:01 19 Q. Please turn to Exhibit 125, sir. That's the answer that
10:39:35 20 was filed on your behalf -- on the Defendants' behalf in this
10:39:37 21 case. Do you recognize that?

10:39:39 22 A. Yes.

10:39:39 23 Q. Please turn to page 11, and I'm going to direct you to
10:39:48 24 paragraph 41?

10:39:49 25 A. Okay.

10:39:50 1 Q. It says there, "NSS has complied with the termination
10:39:55 2 agreement because NSS does not manufacture products, it has not
10:40:01 3 sold any products covered by the termination agreement."

10:40:08 4 Is that true, Mr. Neusch?

10:40:11 5 A. It didn't sell any products covered by the termination
10:40:15 6 agreement that were bid past that point. That's correct.

10:40:18 7 Q. "NSS does not manufacture products." That's what it says
10:40:24 8 here.

10:40:24 9 A. Yes. It was implying that it doesn't manufacture these
10:40:28 10 disputed products in violation of the termination agreement
10:40:31 11 after that date.

10:40:32 12 Q. Does NSS manufacture products?

10:40:39 13 A. NSS represented itself as a manufacturer of products
10:40:43 14 because we would manufacture the automated side and certain
10:40:47 15 portions and we outsource other portions. That's correct.

10:40:49 16 Q. So NSS does not manufacture the structural portion of any
10:40:54 17 product, correct?

10:40:56 18 A. NSS outsources the welding. That's correct. We intended
10:40:59 19 to do the welding per my dad's discussion with me about getting
10:41:04 20 out of contracting and doing manufacturing. So we bought
10:41:07 21 welding machines, got a fabrication shop, and did all that.
10:41:11 22 But he's since confiscated that.

10:41:13 23 Q. You heard Mr. Peng talk about Gibraltar's cash tests on
10:41:18 24 the four disputed products. You heard that?

10:41:21 25 A. Yes.

10:41:21 1 Q. Okay. Turn to the next page. I direct your attention to
10:41:26 2 the sentence at the top of page 12. Are you there?

10:41:32 3 A. Yes.

10:41:33 4 Q. "And neither NSS or BSP has ever manufactured or even
10:41:39 5 intended to manufacture a Gibraltar crash test certified
10:41:45 6 product since the date the termination agreement was executed."

10:41:54 7 A. That's correct.

10:41:55 8 Q. Is that still true?

10:41:56 9 A. Yes.

10:41:57 10 Q. So you have no intent to manufacture any of the disputed
10:42:01 11 products?

10:42:02 12 A. No. We do. Those aren't Gibraltar products. How can you
10:42:05 13 not understand that? We've never claimed that those are
10:42:08 14 Gibraltar products. Those aren't even covered in the
10:42:10 15 termination letter.

10:42:11 16 Q. The four products that Mr. Peng testified that KARCO crash
10:42:16 17 tested for Gibraltar -- generated crash test reports and
10:42:21 18 certifications for the products, you're saying those are not
10:42:27 19 Gibraltar crash tested -- crash test certified products?

10:42:32 20 A. The restraint barrier he corrected the test report to be
10:42:35 21 NEU Security Services, so I don't need to use a Gibraltar
10:42:39 22 certification or anything else. NEU Security Services
10:42:42 23 designed, developed, and made those products. We believe those
10:42:45 24 to be ours. Those are also not covered by the termination
10:42:48 25 agreement. This was in reference to the termination agreement.

10:42:54 1 Read it. It says "termination agreement" right there.

10:42:56 2 Q. It also says that NEU Security Services and Black Security

10:42:59 3 Products do not intend to manufacture any Gibraltar crash test

10:43:08 4 certified product. It doesn't say anything about whether you

10:43:12 5 believe those products are not owned by Gibraltar. It -- it

10:43:17 6 says those products -- and those are the same products we heard

10:43:21 7 Mr. Peng testify about this morning?

10:43:23 8 A. We do not intend to utilize any Gibraltar certifications.

10:43:27 9 That is correct.

10:43:27 10 Q. The question was a little different, though, Mr. Neusch.

10:43:33 11 I appreciate that you're now agreeing that you won't use

10:43:37 12 Gibraltar certifications. But is it accurate to say --

10:43:42 13 A. I've always agreed to that.

10:43:44 14 Q. -- that Gibraltar --

10:43:45 15 I'm sorry. What did you say?

10:43:46 16 A. I have always agreed to that.

10:43:47 17 Q. Okay. Well, let's see if we can reach another agreement

10:43:52 18 then.

10:43:52 19 A. Okay.

10:43:52 20 Q. Okay. We're going to talk about the structural portion of

10:43:56 21 the four disputed products.

10:43:58 22 A. Well, you're talking about an aspect that makes up an

10:44:01 23 overall product. I don't see --

10:44:01 24 Q. And I'm only talking about the structural aspect?

10:44:04 25 A. Then it's not a full product, so ...

10:44:06 1 Q. Okay. Well, perhaps this will be easier than expected.

10:44:11 2 Is it true, as you said in your pleading here, that NEU

10:44:16 3 Security Services and Black Security Products are not going to

10:44:23 4 manufacture the structural portion of the four disputed

10:44:27 5 products?

10:44:28 6 A. We will outsource those as we always have.

10:44:31 7 Q. So you're going to hire somebody else to do it?

10:44:34 8 A. To do the steel portion. We do not weld. We do not put

10:44:37 9 stick to steel.

10:44:38 10 Q. Okay. So you intend to manufacture through a third party

10:44:44 11 the four disputed products -- the structural portion of those

10:44:47 12 products?

10:44:48 13 A. That's correct.

10:44:49 14 Q. Okay. And perhaps we should clarify for the sake of the

10:44:57 15 record whether NEU Security Services or Black Security Products

10:45:02 16 has done that since the termination agreement?

10:45:07 17 A. Has done what?

10:45:08 18 Q. Had manufactured through a third party any of the

10:45:12 19 structural portion of those four disputed products. Has that

10:45:16 20 happened, Mr. Neusch?

10:45:17 21 A. Of the four disputed products? No.

10:45:19 22 Q. You mentioned a minute ago about having a product crash

10:45:27 23 test certified for NSS.

10:45:31 24 THE COURT: Before we move into that, we'll take a

10:45:34 25 15-minute recess at this point and be back at 11 o'clock.

10:45:37 1 (Recess)

11:01:43 2 (Open Court)

11:01:43 3 THE COURT: Mr. Connor, you may continue your direct

11:01:45 4 examination of Mr. Neusch.

11:01:48 5 MR. CONNOR: Thank you, Your Honor.

11:01:50 6 Q. Mr. Neusch, on the top of page 13, paragraph 45 of

11:01:54 7 Plaintiffs' Exhibit 125 it says, "After signing the termination

11:02:00 8 agreement, NSS designed and certified its own K12 cable-based

11:02:04 9 fence." Is that true?

11:02:08 10 A. Well, no. It was BSP, so that was a typo. But also they

11:02:14 11 don't use the designation K12 anymore. It's M50.

11:02:19 12 Q. I'm sorry. It's M50?

11:02:21 13 A. Yes.

11:02:21 14 Q. And you're saying it's not NSS, that's wrong also, because

11:02:25 15 it's BSP, Black Security Products?

11:02:29 16 A. That's correct.

11:02:30 17 Q. And that was after the termination agreement was signed in

11:02:34 18 February of 2015?

11:02:38 19 A. That's correct.

11:02:38 20 Q. And when did that design take place?

11:02:42 21 A. Oh, I don't recall the dates of the design, but it was not

11:02:46 22 too much prior to the crash test.

11:02:48 23 Q. Okay. And the crash test was done in about September of

11:02:52 24 2005 at TTI in College Station, wasn't it?

11:02:56 25 A. No.

11:02:57 1 Q. Where was it done?

11:02:58 2 A. It was 2015, not 2005.

11:03:00 3 Q. I'm sorry. I misspoke.

11:03:02 4 A. Yeah.

11:03:03 5 Q. Thank you. September of 2015?

11:03:04 6 A. That's correct.

11:03:05 7 Q. In College Station?

11:03:07 8 A. Yes.

11:03:07 9 Q. At Texas A&M Transportation Institute?

11:03:10 10 A. That's correct.

11:03:11 11 Q. And they do the same kind of a work that KARCO Engineering

11:03:14 12 does in California, don't they?

11:03:15 13 A. That's correct.

11:03:16 14 Q. Okay. Who owns the M50 cable-based fence that you crash

11:03:25 15 tested in College Station in September of 2015?

11:03:29 16 A. BSP.

11:03:33 17 Q. Black Security Products?

11:03:35 18 A. That's correct.

11:03:36 19 Q. And did Black Security Products pay for the crash testing

11:03:39 20 at TTI?

11:03:40 21 A. They did.

11:03:41 22 Q. And has Black Security Products licensed that product to

11:03:47 23 any third party?

11:03:48 24 A. No.

11:03:49 25 Q. Has it sold that product to any third party?

11:03:53 1 A. Yes.

11:03:54 2 Q. And does it have a certification?

11:03:56 3 A. Yes.

11:03:57 4 Q. What's the rating?

11:03:58 5 A. M50 P2.

11:04:00 6 Q. And who paid for that crash testing? Was it Black

11:04:03 7 Security Products?

11:04:05 8 A. Yes.

11:04:06 9 Q. Okay. Would it surprise you to know that we looked for

11:04:11 10 charges on the Black Security Products QuickBooks that were

11:04:18 11 incurred in connection with that crash testing, that design,

11:04:21 12 that product at TTI, and found nothing?

11:04:25 13 A. Okay.

11:04:26 14 Q. That surprise you?

11:04:28 15 A. Well, BSP's books haven't been reconciled, but if you look

11:04:33 16 at the bank account and the checks written, we wrote the check

11:04:36 17 to TTI.

11:04:37 18 Q. For how much?

11:04:38 19 A. I think it was like \$24,000.

11:04:40 20 Q. So Black Security Products wrote a check to TTI in 2015

11:04:46 21 for \$24,000 to test a new product?

11:04:48 22 A. I don't have the information in front of me, but it was

11:04:51 23 somewhere around there, yes.

11:04:52 24 Q. And with that certification would you say that that

11:04:56 25 product is valuable like these others that we've been talking

11:04:59 1 about?

11:04:59 2 A. That's correct.

11:05:00 3 Q. Okay. So does the value of that product, is it

11:05:07 4 represented on the financial books and records of Black

11:05:09 5 Security Products?

11:05:11 6 A. No. The financial books and records of Black Security
11:05:13 7 Products, there hasn't been much time spent on them because --
11:05:18 8 but we don't have it shown as R & D or anything. We haven't
11:05:22 9 set up the software to show those cost codes and things.

11:05:27 10 Q. Turn back to Exhibit Number 90, please? Are you there?

11:05:42 11 It's the one we were looking at before, Exhibit Number 90.

11:05:46 12 A. Yes.

11:05:46 13 Q. And if you would turn to the page that has the heading
11:05:49 14 Response to Interrogatory Number 6.

11:05:59 15 See it?

11:06:00 16 A. Yes.

11:06:07 17 Q. I'm going to direct you down to the third paragraph. It
11:06:12 18 starts, "Upon information and belief, Defendants do not believe
11:06:16 19 that there are major differences between the products that were
11:06:20 20 manufactured, sold, and/or certified for plaintiffs and the
11:06:26 21 product's Defendants should be permitted to manufacture,
11:06:30 22 advertise, offer to sell, and sell."

11:06:39 23 So is this saying and are you and NEU Security
11:06:40 24 Services and Black Security Products contending in this case
11:06:44 25 that the products that you want to make and sell are

11:06:49 1 substantially the same as the Gibraltar products?

11:06:53 2 A. On the four disputed ones, that is correct.

11:06:56 3 Q. What could you provide in terms of helpful information to

11:07:09 4 Mr. Reynolds, who is here in the court today, so that he could

11:07:12 5 find in the Black Security Products financial records the

11:07:16 6 transactions in connection with the new product that Black

11:07:20 7 Security Products now owns, this M50 P2 cable-based fence?

11:07:26 8 MS. GHAVIMI: Objection, form.

11:07:29 9 A. We can get him the canceled checks and invoices from TTI.

11:07:38 10 Q. And is Black Security Products --

11:07:39 11 A. And the contract with TTI.

11:07:41 12 Q. And is Black Security Products trying to sell that product

11:07:48 13 to any third party?

11:07:51 14 A. Well, I just testified that it has.

11:07:53 15 Q. Okay. As a product line or a product like Gibraltar sold

11:07:58 16 a product line to Betafence, is Black Security Products trying

11:08:02 17 to sell that new certified product to any third party?

11:08:08 18 A. I don't understand the question. Are you asking if I'm

11:08:10 19 trying to sell my rights to the product as Gibraltar did to

11:08:13 20 theirs?

11:08:14 21 Q. I don't know what you just said.

11:08:15 22 A. I'm sorry. I don't understand the question. Are you

11:08:18 23 asking if I'm trying to sell the rights to my product as

11:08:21 24 Gibraltar did to Betafence?

11:08:22 25 Q. Yes.

11:08:23 1 A. No.

11:08:23 2 Q. At the last hearing, Mr. Neusch, you said it was likely

11:08:39 3 that the "and personally" words at the bottom of your signature

11:08:46 4 on the termination notice were added after the fact by

11:08:50 5 Gibraltar. Do you remember testifying about that?

11:08:53 6 A. That is correct, because the version Gibraltar gave me to

11:08:57 7 review never had "and personally" on it.

11:08:59 8 Q. Okay. Turn, please, to PX-77 -- Exhibit 77. Do you

11:09:15 9 recognize 77 as an e-mail to you attaching the termination

11:09:24 10 agreement?

11:09:25 11 A. That is correct.

11:09:25 12 Q. Okay. Look at the attachment there, Mr. Neusch. Do you

11:09:29 13 see the termination agreement?

11:09:30 14 A. I do.

11:09:30 15 Q. And it says under the signature line for you "and

11:09:35 16 personally"?

11:09:36 17 A. That is correct.

11:09:37 18 Q. Turn to PX-78, please. This is the e-mail where you sent

11:09:45 19 it back to Mr. Gibraltar, to Mr. Bryer.

11:09:48 20 A. Yep. That is correct.

11:09:49 21 Q. And turn the page and look at your signed copy of the

11:09:52 22 termination agreement. Just like the one you received, it says

11:09:55 23 "and personally" below your name.

11:09:57 24 A. Well, Gibraltar --

11:09:58 25 Q. Does it? Just answer my question, please. Does it say

11:10:01 1 "and personally" underneath your signature just like the
11:10:06 2 version that was sent to you to sign?

11:10:08 3 A. Yes. But the version that was sent to me to review did
11:10:11 4 not have it.

11:10:12 5 Q. We just looked at the version --

11:10:13 6 A. That was not the one sent to me for review. If you look
11:10:16 7 at the e-mail where they said "please review this," it was
11:10:18 8 earlier in the day. Then later they said, here, sign this
11:10:21 9 right away. It's two different e-mails, and the one did not
11:10:24 10 have "and personally" that they sent for "please review" as the
11:10:28 11 working copy. That was a soft copy as well.

11:10:31 12 Q. Mr. Neusch, have you ever endorsed a check, a payment
11:10:39 13 that's to NEU Security Services or Black Security Products --
11:10:43 14 received a check and endorsed it and caused those funds to be
11:10:49 15 directed into one of your personal accounts, your wife's
11:10:53 16 personal accounts or personal account of somebody else other
11:10:57 17 than NEU Security Services or Black Security Products?

11:11:00 18 A. Not that I recall.

11:11:01 19 Q. You don't know whether you've ever done that?

11:11:04 20 A. I don't remember ever doing that, no.

11:11:07 21 Q. If you had -- and I don't think you're testifying that you
11:11:12 22 can rule that out; is that correct?

11:11:14 23 A. Well, I'm not aware of ever doing that. Now, if you have
11:11:18 24 something showing that I did, then I'm mistaken. But I'm not
11:11:22 25 aware of ever doing that.

11:11:23 1 Q. If you had, Mr. Neusch, the only way to know whether those
11:11:26 2 funds that were paid to NEU Security Services or Black Security
11:11:30 3 Products ever made it to NEU Security Services or Black
11:11:35 4 Security products would be to look in your personal accounts
11:11:39 5 and see if they were deposited there?

11:11:41 6 A. Yeah. Or I would have to give the receipt to accounting
11:11:44 7 and tell them to code it to owner's draw or something.

11:11:49 8 Q. Turn to PX-96, please.

11:11:53 9 A. Yeah.

11:11:53 10 Q. Do you recognize this as the bid by Black Security
11:12:00 11 Products on the Richmond job, the Social Security
11:12:04 12 Administration Building in California?

11:12:07 13 A. Yes.

11:12:07 14 Q. And the date on that bid is July the 17th, 2015, correct?

11:12:16 15 A. Yes.

11:12:16 16 Q. Okay. And if you'll turn the page to ending in 1906,
11:12:36 17 three pages in, there's a heading there, Description of the
11:12:44 18 Work, and the two last items, items 3 and 4 are for
11:12:47 19 installation. Do you see those?

11:12:49 20 A. Yes.

11:12:49 21 Q. And the total for the installation is \$105,000, correct?

11:12:56 22 A. Yes.

11:12:56 23 Q. Now, turn the tab to PX-97. This is the contract that was
11:13:10 24 awarded by GEMS to Black Security Products the next month,
11:13:13 25 August of a 2015, correct?

11:13:14 1 A. That's correct.

11:13:15 2 Q. And this contract amount, if you'll turn to the second
11:13:18 3 page -- sorry -- the fourth page ending in 1915, section 4,
11:13:29 4 contract price, it states there the total contract price of
11:13:32 5 \$300,242.12. Do you see that?

11:13:35 6 A. Yes.

11:13:36 7 Q. Is that correct?

11:13:37 8 And if you turn the page to sections -- section 9 at
11:13:42 9 1917, there's approval for a subcontract to NSS. And the
11:13:51 10 amount of the approval for the subcontract to NSS \$105,000 just
11:13:56 11 like it was in the bid, correct?

11:13:57 12 A. Yes.

11:13:57 13 Q. Okay. So the bid that you put in was for \$300,000, you're
11:14:09 14 awarded that contract, and you said to GEMS you're going to
11:14:13 15 subcontract \$105,000 for the installation to NSS.

11:14:18 16 A. That is incorrect.

11:14:23 17 Q. That's what section 9 says, though, right?

11:14:25 18 A. No.

11:14:25 19 Q. You got approval to subcontract to NSS 105 -- it says Neu
11:14:30 20 for \$105,000. That's what it says, right?

11:14:34 21 A. GEMS is the author of this contract. They put that in
11:14:38 22 there as a possible one and only subcontractor if we were going
11:14:42 23 to subcontract. Nowhere does it say that we had to subcontract
11:14:45 24 to NSS. And also GEMS pulled that directly from my proposal.
11:14:50 25 My proposal for \$105,000 with installation also included the

11:14:54 1 integration and all the automation and that stuff. That was
11:14:57 2 subcontracted out from BSP to American Barriers. That was not
11:15:02 3 inclusive of the subcontract to NSS. Therefore, that \$105,000
11:15:07 4 was cost coded to multiple items that wasn't also contracted to
11:15:10 5 NSS.

11:15:11 6 Q. You only had permission to subcontract to NEU Security
11:15:14 7 Services according to this contract, correct?

11:15:17 8 A. They were acknowledging NEU Security Services. That's
11:15:20 9 correct.

11:15:20 10 Q. Turn to Exhibit P-85, please.

11:15:34 11 A. Okay.

11:15:34 12 Q. This is the subcontract between Neu Security Services and
11:15:36 13 Black Security Products for the GEMS Richmond job, correct?

11:15:42 14 A. That's correct.

11:15:43 15 Q. And if you'll turn to the signature page at 2711, it's
11:15:47 16 signed on behalf of NSS, or Neu Security Services, by you, and
11:15:52 17 it's signed on behalf of Black Security Products by you?

11:15:55 18 A. That's correct.

11:15:56 19 Q. Same day?

11:15:57 20 A. That's correct.

11:15:58 21 Q. And what's the face value of this fixed price contract?

11:16:03 22 A. \$45,000.

11:16:06 23 MR. TAYLOR: No further questions, Your Honor.

11:16:13 24 THE COURT: Any cross-examination?

11:16:15 25 MS. GHAVIMI: Yes, Your Honor. But I would also like

11:16:18 1 to reserve to call Mr. Neusch in our case in chief.

11:16:20 2 THE COURT: You may.

11:16:21 3 MS. GHAVIMI: Thank you.

11:16:47 4 **CROSS-EXAMINATION**

11:16:47 5 **BY MS. GHAVIMI:**

11:16:47 6 Q. Mr. Neusch, looking at that document you were just on, why
11:16:50 7 was the subcontract between NSS and BSP a fixed price?

11:16:54 8 A. It was a fixed price contract because the contract with
11:16:57 9 BSP and GEMS was fixed price -- from a fixed price.

11:17:09 10 Q. So because the contract between GEMS and BSP was a fixed
11:17:12 11 price, the contract between NSS and BSP was a fixed price; is
11:17:12 12 that correct?

11:17:13 13 A. That's correct. Generally construction it's like flow
11:17:16 14 down contracting. You have your contract with them and the one
11:17:19 15 you have with your client. So ...

11:17:21 16 Q. Okay. Now I would like to take a step back here and ask
11:17:30 17 you a few questions about the construction business generally
11:17:32 18 just to make sure everybody understands some of these
11:17:35 19 termination -- some of the terms that we're using.

11:17:39 20 Could you explain with respect to these four products
11:17:44 21 that are at issue here, what does "manufacture" mean?

11:17:52 22 A. Well, that's what I was trying to get at earlier. Most of
11:17:56 23 the manufacturers in the barrier industry, they don't do
11:17:57 24 everything in-house. They outsource parts of it. NEU Security
11:18:01 25 Services has had -- has gotten POs and has had material only

11:18:06 1 projects where we were named as a manufacturer and we provided
11:18:09 2 a turnkey product as the manufacturer. It was even on some of
11:18:12 3 our literature on our Web site. We've been known as the
11:18:14 4 manufacturer on many projects.

11:18:16 5 So the term "manufacturer," that's what I was trying
11:18:19 6 to get at, because you can have sub-manufacturers of an overall
11:18:22 7 system, as Gibraltar was for the steel fabrication.

11:18:26 8 Q. So does NSS manufacture the entire portion of a wedge
11:18:32 9 barrier?

11:18:34 10 A. NSS -- when you say "manufacture," NSS will pay the labor
11:18:39 11 and actually do its own part of it and then it will outsource
11:18:44 12 others. But you can be a manufacturer in the barrier industry,
11:18:47 13 like most of the competitors that I have and Gibraltar have,
11:18:51 14 where they don't do any of the manufacturing. They outsource
11:18:54 15 100 percent of it turnkey, just like the contractor that built
11:18:58 16 this building probably didn't self-perform any of the work with
11:18:59 17 actual employees, it subcontracted entire portions, but it was
11:19:03 18 still considered the contractor that built the building.

11:19:05 19 Q. So, in your opinion, Gibraltar is not a manufacturer?

11:19:08 20 A. Gibraltar does manufacturing. Gibraltar does a lot of
11:19:12 21 steel manufacturing. Now that they've tried to take these
11:19:16 22 products from me, they've tried to take on my portion that I
11:19:19 23 was outsourcing and doing and combining -- and combining it
11:19:22 24 with doing what I was doing to try to make these products
11:19:24 25 themselves.

11:19:24 1 Q. So could you explain what the -- what you mean when you
11:19:28 2 use the term "fabrication"?

11:19:30 3 A. Fabrication, manufacturing, it's all kind of used in the
11:19:35 4 same sense. But as representing yourself as a manufacturer,
11:19:41 5 you can -- like I said, you manufacture multiple different
11:19:46 6 entities to put together a complete system.

11:19:48 7 Q. So for a wedge barrier fabrication -- let me restate that.

11:19:55 8 What part of the wedge barrier would be fabricated?

11:19:59 9 A. What part did I fabricate?

11:20:03 10 Q. No. What part of a wedge barrier would a third party
11:20:07 11 fabricate?

11:20:08 12 A. Well, it depends on how I broke it up. You know, I mean,
11:20:12 13 we could outsource the entire fabrication to one company if
11:20:15 14 they had the capability and means to. You can break it down
11:20:18 15 into five different subsets of companies you could outsource
11:20:22 16 the manufacturing to. You know, you have the painting, the
11:20:25 17 galvanizing. That's always outsourced. Gibraltar outsources
11:20:29 18 it. They don't do it in-house.

11:20:31 19 You have the steel fabrication and welding. All
11:20:33 20 right. So you put the pieces together and put stick to rod and
11:20:37 21 do the cutting. And even the cutting of the steel, for
11:20:39 22 example, might be outsourced if the steel is big enough and
11:20:42 23 they don't have a saw inside their shop that can cut it.
11:20:45 24 There's so many subsets of the manufacturing process, what you
11:20:47 25 would outsource is different depending on who does it. What

11:20:51 1 we're arguing about here is who has the right to sell these
11:20:54 2 products as the manufacturer.

11:20:55 3 Q. When one of these products is installed on a crash test
11:21:00 4 site, what is involved in the installation?

11:21:04 5 A. Well, there again, it all varies depending on how much
11:21:10 6 prior fabrication you do. But when we installed the products
11:21:14 7 in question, you know, we did some of the fabricating on-site.
11:21:18 8 We did a lot of the fabricating on-site for some of them and
11:21:21 9 some of them a little bit less, depending on how much Gibraltar
11:21:25 10 did. But then we also did the install.

11:21:28 11 Q. Okay. For three of the four disputed products that are at
11:21:36 12 issue, that we heard the deposition testimony earlier of
11:21:40 13 Mr. Peng from KARCO, the M50 P2 cable crash fence and the M50
11:21:52 14 P1 P2 K12 cable restraint barriers, the three crash tests that
11:21:59 15 Plaintiff is asserting NSS -- and I have the four disputed
11:22:18 16 products listed up here on the screen.

11:22:24 17 So for the first three products -- and I'd like to go
11:22:30 18 through them just so everybody can have a visual. Could you
11:22:40 19 please tell the Court what this product is.

11:22:43 20 A. That's the 24-foot restraint barrier that's M50 rated -- I
11:22:49 21 mean, yeah, restraint barrier. That's correct.

11:22:51 22 Q. Did NSS perform the installation of this product on the
11:22:55 23 crash test site?

11:22:56 24 A. Yes.

11:22:56 25 Q. Okay. What is this product?

11:23:02 1 A. It's the 50-foot restraint barrier.

11:23:05 2 Q. Okay. What's the difference between this and the one we

11:23:11 3 just looked at?

11:23:12 4 A. Just width. The only difference between the two products

11:23:16 5 is the width, because the industry dictates that you have to

11:23:19 6 have a maximum width and minimum width if you want to use

11:23:22 7 variable widths of a product to crash test it.

11:23:25 8 Q. Are both of these products active vehicle barriers?

11:23:30 9 A. They both are. Yes, ma'am.

11:23:32 10 Q. Could you explain how they are active for the Court.

11:23:36 11 A. Yes. They vertically lift out of the ground. So it's

11:23:41 12 housed in a pan that's in the ground. And then, either by

11:23:50 13 electric actuation or hydraulic actuation, the entire

11:23:53 14 contraption that houses the cable and the T-post there is

11:23:56 15 lifted up out of the ground into what would be considered the

11:24:02 16 secure position.

11:24:05 17 Q. Okay. Did NSS perform the installation for this crash

11:24:08 18 test?

11:24:09 19 A. Yes.

11:24:10 20 Q. Okay. Okay. And what is this product?

11:24:14 21 A. That's the finger wedge barrier.

11:24:17 22 Q. Okay. Is this also an active vehicle barrier?

11:24:21 23 A. That is an active vehicle barrier. Yes, ma'am.

11:24:24 24 Q. Did NSS perform the installation on this crash test?

11:24:31 25 A. No, they did not.

11:24:32 1 Q. And what is this product?

11:24:35 2 A. That's the M50 P2 crash fence.

11:24:39 3 Q. Okay. Is this an active vehicle barrier?

11:24:42 4 A. It is not. That is a passive vehicle barrier.

11:24:45 5 Q. Could you explain what a passive vehicle barrier is?

11:24:49 6 A. A passive vehicle barrier is one that doesn't have any

11:24:52 7 moving parts or actuation to it. It's generally used not in a

11:24:56 8 roadway, but at like a perimeter of a facility or property

11:25:02 9 line, like a fence.

11:25:03 10 Q. Okay. Did NSS perform the installation of this crash

11:25:06 11 test?

11:25:06 12 A. Absolutely. Yes, it did.

11:25:08 13 Q. Okay.

11:25:09 14 A. You can even see me in some of the pictures from the crash

11:25:13 15 test report.

11:25:14 16 Q. Okay. Could you turn to turn to -- and I'm going to hand

11:25:35 17 you Defendants' exhibit binder.

11:25:55 18 Could you turn to Exhibit 49 -- Defendants'

11:26:04 19 Exhibit 49.

11:26:08 20 A. Okay.

11:26:09 21 MS. GHAVIMI: And, Your Honor, this is an exhibit

11:26:11 22 that was discussed in the KARCO deposition.

11:26:19 23 THE COURT: Well, what exhibit is it in the KARCO

11:26:25 24 deposition?

11:26:26 25 MS. GHAVIMI: K-11.

11:26:27 1 THE COURT: All right. So K-11 in the KARCO
11:26:31 2 deposition is the same as Defendant's 49; is that correct?

11:26:35 3 MS. GHAVIMI: Yes.

11:26:42 4 Q. Now, I'm going to ask you to look through Defendants'
11:26:46 5 Exhibit 49, 50, 51, and 52.

11:27:00 6 MS. GHAVIMI: And Defendants' Exhibit 50, for the
11:27:04 7 record, is Exhibit K-14 from the KARCO deposition, Defendants'
11:27:10 8 Exhibit 51 is Exhibit K-22 from the KARCO deposition, and
11:27:15 9 Defendants' Exhibit 52 is Exhibit K-17 from the KARCO
11:27:19 10 deposition.

11:27:20 11 THE COURT: Okay.

11:27:22 12 Q. (BY MS. GHAVIMI) Please let me know when you are finished.

11:27:25 13 A. I'm done.

11:27:25 14 Q. Okay. These are all invoices from KARCO to Gibraltar and
11:27:31 15 payments from Gibraltar to KARCO for crash tests?

11:27:37 16 A. Yes.

11:27:37 17 Q. Okay. Do NSS's installation costs for these crash tests
11:27:44 18 appear on any of these invoices?

11:27:48 19 A. No.

11:27:48 20 Q. Okay. And why not?

11:27:55 21 A. Because KARCO doesn't perform the installation. So we
11:28:02 22 perform the installation and we incurred the cost ourselves
11:28:06 23 because it was on a product development to install our product.

11:28:11 24 Q. So because NSS performs the installation itself, NSS does
11:28:17 25 not invoice KARCO for these installation costs?

11:28:20 1 A. Absolutely not.

11:28:21 2 Q. Does NSS invoice Gibraltar for these installation costs?

11:28:26 3 A. No.

11:28:26 4 Q. Okay. Does KARCO provide employees at the crash test site
11:28:38 5 while NSS is installing the products?

11:28:41 6 A. KARCO has oversight, so they have to inspect the
11:28:46 7 installation to make sure we do it to spec. And if there's any
11:28:52 8 variances, they have to note it. If we make any changes, which
11:28:55 9 a lot of changes are made during the installation, they note it
11:28:58 10 so it can be noted on the crash test report and, because it's
11:29:02 11 their property, they have supervision. But they do not perform
11:29:06 12 any installation, no.

11:29:07 13 Q. Okay. If you could turn -- if you could look at
11:29:11 14 Defendants' Exhibit 52 for a moment and turn to the second
11:29:15 15 page.

11:29:19 16 A. Okay.

11:29:19 17 Q. Do you see at the bottom of the KARCO invoice, could you
11:29:22 18 read for me the balance due for the total crash test?

11:29:25 19 A. \$1,500. Sorry. On the second page?

11:29:35 20 Q. Yes. These -- these pages are double-sided, so I'm --

11:29:39 21 A. So the third page.

11:29:40 22 Q. -- the second page, but it's actually the third page?

11:29:43 23 A. Got you. \$30,850.

11:29:45 24 Q. Yes. Okay. Could you turn to Defendants' Exhibit 54.

11:29:57 25 A. Okay.

11:29:57 1 Q. This is an application for payment to Fort Gillem; is that
11:30:03 2 correct?

11:30:04 3 A. Yes, ma'am.

11:30:05 4 Q. Okay. If you could turn to the back of the exhibit?

11:30:13 5 A. Okay.

11:30:13 6 Q. What products were installed on this project?

11:30:22 7 A. The restraint barrier and the M50 P2 fence. That's two of
11:30:26 8 the four products in dispute.

11:30:28 9 Q. Okay. And do you see where are these products listed on
11:30:31 10 the second page?

11:30:31 11 A. On the second page, the restraint barrier being an active
11:30:36 12 vehicle barrier, is items one and two. Material is 131,000.

11:30:42 13 Labor for installing it, 77,800. Then you have the active
11:30:47 14 wiring and hookup, and then you have the passive barrier, so on
11:30:50 15 and so a forth. The passive would be the M50 P2 fence.

11:30:55 16 Q. Okay. Just so I have it correct, the active vehicle
11:30:59 17 barrier labor you said was listed on line 2?

11:31:04 18 A. That's correct.

11:31:04 19 Q. And the amount invoiced for the labor costs for the cable
11:31:11 20 restraint barrier, a product at issue here, was \$77,800?

11:31:16 21 A. Yes, ma'am.

11:31:17 22 Q. So if you were to install a cable restraint barrier for a
11:31:21 23 third party, you would invoice them the amount of \$77,800?

11:31:25 24 A. Yes. So if the crash test --

11:31:27 25 THE COURT: Let me interrupt you-all here for a

11:31:30 1 minute. We started at 9:30. It's now 11:30. We took a
11:31:35 2 15-minute break. Where are you-all taking me both with your
11:31:40 3 direct questions and now this cross-examination to any of the
11:31:45 4 elements that would make it more or less likely that I would
11:31:50 5 either grant preliminary injunctive relief or a receivership or
11:31:55 6 not grant preliminary injunctive relief or a receivership?

11:31:59 7 I found the testimony this morning extremely
11:32:03 8 interesting, but I'm having a hard time relating it to any of
11:32:08 9 the decisions that I'm going to make in this case. So can I
11:32:13 10 have some help from you-all here? Somebody want to tell me?

11:32:17 11 MS. GHAVIMI: Your Honor, may I go first?

11:32:19 12 THE COURT: You may.

11:32:21 13 MS. GHAVIMI: Your Honor, the plaintiffs are seeking
11:32:23 14 a broad injunction, in our opinion, an injunction against NSS
11:32:29 15 and BSP which are separate companies. And they're seeking to
11:32:32 16 enjoin them from selling products which our contention is that
11:32:37 17 are not owned by Gibraltar. We are attempting to prove and
11:32:42 18 demonstrate that our client has rights in these products.

11:32:47 19 NSS -- that, one, BSP should not be enjoined at all,
11:32:54 20 Stephen Neusch should not be enjoined at all, and that NSS has
11:32:59 21 rights in these products by virtue of its contribution to the
11:33:02 22 crash tests, by virtue of no intellectual property
11:33:05 23 restrictions, and by virtue of the fact that the termination
11:33:08 24 agreement did not cover any of these four disputed products.

11:33:13 25 And, second, that we would appreciate if we had a

11:33:17 1 period of time to make closing arguments to wrap up other
11:33:21 2 evidence that --

11:33:22 3 THE COURT: Oh, I'm just trying to let the rest of
11:33:25 4 you get -- get in whatever the rest of the evidence you want.
11:33:30 5 I'm going to be talking to you after it's over. But I hope the
11:33:34 6 closing arguments are more focused than what I've been hearing
11:33:37 7 in the way of testimony because these invoices are not making
11:33:41 8 it more or less likely that I'm going to grant relief or not
11:33:46 9 grant relief because I haven't heard them being tied into the
11:33:50 10 four products that are at issue here. I just hear a lot of
11:33:54 11 talk about this.

11:33:56 12 But I say this to both of you: You've spent an hour
11:34:00 13 and 45 minutes when I exclude the break this morning, and I
11:34:04 14 haven't heard anything that's helped me make a decision in this
11:34:08 15 case yet. So I just tell you-all that. I know that the
11:34:10 16 lawyers always envision the case differently than the person
11:34:15 17 that's going to have to make the decision. I did it when I was
11:34:18 18 in private practice. But I'm just telling you we haven't
11:34:24 19 advanced the ball this morning toward the decision-making
11:34:28 20 process.

11:34:31 21 Now, you want to keep going this way, you're welcome
11:34:37 22 to do it. But you're not focusing -- nobody is focusing the
11:34:41 23 court on the four products at question and what I should do
11:34:48 24 with them or whether or not there is going to be great harm
11:34:55 25 that -- that befalls the plaintiffs if I don't grant a

11:35:00 1 receivership. I just hear a lot of talk about the way this
11:35:03 2 business is run and the way the contracts are.

11:35:06 3 And I would just appreciate it if you would focus it
11:35:09 4 a little more on what is at issue in this case. And what is at
11:35:20 5 issue here I don't believe -- and if I'm wrong, then you
11:35:24 6 haven't done a good job of focusing me to it -- but I don't see
11:35:29 7 how these invoices are in any way dispositive of what I'm going
11:35:37 8 to do with this case. So I just tell you-all that.

11:35:41 9 I think you could have told me in 10 minutes exactly
11:35:44 10 what was done with this product that KARCO tested and that
11:35:53 11 we're talking about invoices for in a manner that said -- and
11:35:59 12 I'm just giving an example. I'm not saying this is what the
11:36:03 13 evidence would be -- NSS manufactured an M50 wedge restraining
11:36:08 14 device. The way they manufactured it was they did this amount
11:36:12 15 of work, they jobbed out this, that, and the other. Gibraltar
11:36:16 16 did this. They came up with a finished product that was
11:36:19 17 tested, it was certified, and it was installed at such and
11:36:23 18 such. Then tell me how that violated the termination
11:36:30 19 agreement.

11:36:30 20 I mean, we're wandering way out there in the reeds,
11:36:33 21 and it's -- it's just fine. But it's not helping me get to
11:36:37 22 where I want to get, which is to make a decision in this case.
11:36:41 23 So I just tell you that at this point. The morning has not
11:36:44 24 been helpful to the court. So you may proceed.

11:36:49 25 MS. GHAVIMI: Okay.

11:36:54 1 Q. Mr. Neusch, the four products that are disputed here, did
11:37:02 2 NSS develop them?

11:37:03 3 A. NSS designed and -- "developed" is a broad term, but NSS
11:37:15 4 designed the restraint barrier in its entirety. NSS has spent
11:37:21 5 money defending restraint barriers, its own product. Gibraltar
11:37:22 6 has refused to sell it at times, has said it's not their
11:37:25 7 product, admitted to it. It is NSS's product I wholeheartedly
11:37:30 8 believe.

11:37:30 9 The wedge barrier I believe to be both part my
11:37:34 10 product and part Gibraltar's product, as I had the overall
11:37:39 11 conceptual design and a lot of the ideas that make the product
11:37:41 12 even sellable today were my ideas. My dad put in good ideas
11:37:45 13 with the way of making it work and adjusting some things. He
11:37:48 14 also had design in it, they paid for the crash test on it, and
11:37:51 15 the installation. We marketed it and sold it and put it in the
11:37:55 16 industry. We also did the manufacturing for the automated side
11:37:59 17 which requires, you know, just as much work, if not more
11:38:03 18 complicated, than the steel side. There's a lot of tentacles
11:38:07 19 to that, but I do believe that NSS has rights to the wedge
11:38:11 20 barrier.

11:38:11 21 And on the M50 P2 fence, NSS spent money on the crash
11:38:16 22 test, did the install, did some fabrication at the test
11:38:20 23 facility, and NSS also had the idea to crash it without a
11:38:25 24 terminal post on one end so that we could use any length of
11:38:28 25 need. Had a lot of good ideas in even doing it because we only

11:38:31 1 had an M50 P1 fence before that we were marketing and our
11:38:36 2 competition had P2. So I had the idea to crash test the P2 and
11:38:40 3 brought it to my dad. Me and my dad worked on these products
11:38:42 4 together. That is where we're at.

11:38:46 5 Q. Did you believe the four disputed products were included
11:38:51 6 in the termination letter?

11:38:55 7 A. I've never seen the actual Betafence agreement, and the
11:38:59 8 products in the termination letter that they're terminating our
11:39:04 9 rights to were the ones sold to Betafence. I know for a fact
11:39:08 10 that the wedge barrier wasn't included in there. I know that
11:39:11 11 the restraint barrier was initially tried to be included in
11:39:13 12 there. I called my dad and said, Hey, you can't sell that to
11:39:17 13 Betafence. That's my product. I have rights to that product.
11:39:19 14 And he agreed with me, so he had it removed from the Betafence
11:39:23 15 deal. So I know that one is not in the sale to Betafence. The
11:39:26 16 M50 P2 fence is probably in the sale because it's part of the
11:39:30 17 cable-based deal of families. I haven't seen it, but I'm sure
11:39:33 18 it is.

11:39:33 19 Q. Why do you believe that these four products were not
11:39:36 20 included in the termination letter?

11:39:39 21 A. I believe that three of the four weren't. I think that
11:39:42 22 one may have been and probably was. So why do I believe
11:39:45 23 three -- the three products weren't included in the
11:39:47 24 termination?

11:39:48 25 Q. Yes.

11:39:48 1 A. Because they didn't sell it to Betafence. And the
11:39:51 2 termination agreement -- the whole point of the termination
11:39:54 3 letter was Betafence wanted me to sign a letter saying that I
11:39:57 4 would not go out and compete with them on their own products
11:40:01 5 that they just spent \$8 million to buy.

11:40:03 6 So for my dad to complete his sale, he called me up
11:40:07 7 and said I need you to sign a one-pager saying you're not going
11:40:11 8 to go out and manufacture these products anymore if I sell
11:40:15 9 these. And, if you're going to, you have to buy them -- if
11:40:19 10 you're going to get them, you have to buy them from Betafence.
11:40:22 11 I said no problem to help them out with the sale. There was no
11:40:25 12 consideration given to me. I signed the deal and that was for
11:40:30 13 the cable-based products they sold to Betafence, not the
11:40:33 14 restraint barriers or the wedge barrier.

11:40:36 15 Q. So you signed the termination letter because you wanted to
11:40:39 16 help your dad sell the products -- the cable-based products to
11:40:43 17 Betafence?

11:40:44 18 A. That's correct. Well, my dad was also at the same time
11:40:47 19 designing and developing a competing product that would compete
11:40:51 20 with the one they sold Betafence anyway that he then priced me
11:40:54 21 and was going to sell me anyway. So it didn't really hurt my
11:40:57 22 business to get rid of those. And I could still buy them from
11:41:00 23 Betafence if needed.

11:41:01 24 Q. Can you turn to Defendants' Exhibit 39.

11:41:12 25 A. Okay.

11:41:12 1 Q. Can you turn to the second to last page. I'm looking at
11:41:18 2 addendum A. It says page 12 on the top right-hand corner.
11:41:21 3 This is a list of exclusive products.

11:41:23 4 A. Yes.

11:41:23 5 Q. So this agreement -- this is an agreement. Is this the,
11:41:27 6 quote/unquote, license agreement that the parties have been
11:41:30 7 referring to?

11:41:33 8 A. This is the license agreement that we've been referring
11:41:35 9 to, yes.

11:41:36 10 Q. Did you sign this agreement?

11:41:37 11 A. No, I did not.

11:41:38 12 Q. Why not?

11:41:39 13 A. I didn't agree with the minimum royalties, and I thought
11:41:42 14 it was overreaching and really just onerous for me as far as
11:41:46 15 the amount of costs I would have to pay and then do all the
11:41:49 16 manufacturing and Gibraltar do nothing but sit back and receive
11:41:52 17 a check.

11:41:52 18 Q. You didn't sign this agreement but, yet, did you negotiate
11:41:55 19 this agreement over a course of time with your father?

11:41:59 20 A. That's correct. I negotiated this agreement. We went
11:42:03 21 back and forth on it a lot. Yeah.

11:42:05 22 Q. Okay. Is it your understanding that the top section of
11:42:12 23 products on addendum A is what was included in the Betafence
11:42:19 24 sale?

11:42:19 25 A. That is correct. So the reason that this is broken up

11:42:23 1 into two sections of products, the top section that has USA
11:42:25 2 only, Betafence outside USA is because Gibraltar was selling
11:42:31 3 Betafence this group of projects outside the continental U.S.
11:42:34 4 and selling it exclusively to us inside the U.S.

11:42:38 5 So Betafence then wanted to go from this type of
11:42:40 6 agreement they have with Gibraltar to actually buying the full
11:42:43 7 rights of the product so they didn't have to pay a royalty
11:42:46 8 anymore. So they were buying that top section of the products.

11:42:48 9 Q. Is the wedge barrier listed in the bottom section?

11:42:51 10 A. It is. The wedge barrier was not sold to Betafence.

11:42:56 11 Q. Are the cable restraint barriers, two of the -- well, let
11:43:01 12 me just back up. The wedge barrier is one of the four disputed
11:43:04 13 products at issue here; is that correct?

11:43:07 14 A. It is.

11:43:07 15 Q. Okay. The cable restraint barriers, are those listed
11:43:10 16 here, the two cable restraint barriers that are at issue here?

11:43:15 17 A. Yes. It's down on the bottom part. That wasn't sold to
11:43:18 18 Betafence or part of the termination agreement.

11:43:20 19 Q. Could you point exactly and read their description for the
11:43:22 20 Court.

11:43:23 21 A. On this list it says wedge barrier, 8 foot to 14.5 feet.
11:43:29 22 And it says vertical lift barrier, 24-foot, and vertical lift
11:43:33 23 barrier, 50-foot. That's the restraint barrier that you showed
11:43:34 24 on your slide earlier.

11:43:36 25 Q. Okay. Did your father tell you that the M50 P2 cable

11:43:49 1 crash fence was going to be sold to Betafence?

11:43:50 2 A. We didn't talk about it specifically, but I assumed it was

11:43:52 3 because it was part of the group up top, yeah.

11:43:54 4 Q. So when you read the termination letter, it's your

11:43:56 5 understanding that it includes -- it does not include -- let me

11:44:02 6 start again.

11:44:03 7 When you read the termination letter, you have

11:44:06 8 understood since you signed it that it only included -- it did

11:44:10 9 not include the three products we just mentioned?

11:44:14 10 A. It doesn't. No, it doesn't include those products. Not

11:44:19 11 at all, no.

11:44:20 12 Q. So NSS would not be in breach of the termination letter if

11:44:24 13 it were to sell those products under NSS's name?

11:44:27 14 A. That's correct.

11:44:28 15 Q. So Gibraltar would not be harmed if NSS were to sell those

11:44:33 16 products because NSS would not be in breach of the termination

11:44:38 17 letter?

11:44:40 18 A. NSS would not be in breach of the termination letter if we

11:44:44 19 sold the restraint barrier or wedge barrier, no.

11:44:46 20 Q. Gibraltar would not be harmed if NSS sold the M50 P2

11:44:51 21 cable -- I apologize.

11:44:52 22 Gibraltar would not be harmed if NSS sold the cable

11:44:56 23 restraint barriers and the finger wedge barrier because those

11:44:58 24 were NSS's designs to begin with?

11:45:02 25 A. Yes. Gibraltar would not be harmed.

11:45:04 1 Q. Okay. Now, the M50 P2 cable crash fence that counsel
11:45:16 2 asked you earlier that BSP crash tested in 2015, is that one of
11:45:23 3 the four disputed products at issue here?

11:45:25 4 A. No.

11:45:26 5 Q. So Defendants' interrogatory responses were not incorrect?

11:45:35 6 A. Yes. They were not incorrect.

11:45:37 7 Q. Okay. And why is it not one of those four disputed
11:45:45 8 products at issue here?

11:45:46 9 A. The four disputed products are -- it's not one of them.

11:45:51 10 It's one that BSP developed on its own outside of any awareness
11:45:56 11 from Gibraltar, zero input from Gibraltar, and, as my dad
11:46:00 12 testified to in the first hearing or whatever, he never even
11:46:03 13 knew about it until, you know, the end of the year, well after
11:46:06 14 it was crash tested and developed.

11:46:08 15 Q. So it would not be covered by the injunction requested?

11:46:11 16 A. No.

11:46:30 17 MS. GHAVIMI: Okay. Your Honor, I would like to
11:46:32 18 reserve the rest for my direct.

11:46:33 19 THE COURT: You may.

11:46:36 20 Mr. Connor?

11:46:37 21 **REDIRECT EXAMINATION**

11:46:37 22 **BY MR. CONNOR:**

11:46:43 23 Q. Can you pull up exhibit number eight?

11:46:45 24 A. On your exhibits or mine?

11:46:46 25 Q. Under the plaintiffs'. So in the black binder.

11:46:50 1 A. Okay.

11:46:51 2 Q. Exhibit 8 is the termination agreement that you signed,

11:47:17 3 correct? You recognize that? We talked about it earlier.

11:47:19 4 A. Yes.

11:47:19 5 Q. Okay. Now, when you spoke a minute ago about negotiating

11:47:25 6 the terms of the license agreement with Gibraltar --

11:47:30 7 A. Yes.

11:47:31 8 Q. -- you pointed to the list of exclusive products in

11:47:36 9 addendum A to that agreement?

11:47:38 10 A. Yes.

11:47:38 11 Q. Okay. You never negotiated or asked for any changes to

11:47:44 12 that list, did you?

11:47:46 13 A. No.

11:47:46 14 Q. Okay. Would you agree, Mr. Neusch, that we simply have a

11:47:52 15 fight here -- a definitional fight over what's covered by the

11:47:57 16 termination agreement? Because you testified earlier that

11:48:06 17 you're positive, you're sure, you put in the interrogatory

11:48:10 18 response and you testified to today that neither NSS, Neu

11:48:14 19 Security Services, nor Black Security Products have done

11:48:18 20 anything with those disputed products that are Gibraltar

11:48:21 21 products since the termination agreement.

11:48:24 22 A. I've never said they're Gibraltar products.

11:48:27 23 THE COURT: Now, let me interrupt here. I'm looking

11:48:30 24 at Plaintiffs' Exhibit Number 8 which is the exhibit you have

11:48:33 25 the witness looking at; is that correct?

11:48:37 1 MR. CONNOR: Yes, Your Honor.

11:48:37 2 THE COURT: All right. Now, I just want to make sure

11:48:39 3 that this is the termination notice that you want the court to

11:48:48 4 consider, because very faintly in the background one can see

11:48:52 5 "draft" on it. Page 11, which is the primary signature page on

11:48:57 6 the one I'm looking at, is not signed or dated anywhere.

11:49:08 7 MR. CONNOR: Yes, Your Honor.

11:49:09 8 THE COURT: There is a later edition or a later

11:49:13 9 couple of pages, and the very last page has a signature. So is

11:49:19 10 this the iteration of the agreement you want the court to look

11:49:24 11 at to determine if it has been breached and has it been signed

11:49:30 12 by all of the parties because it doesn't appear to have had

11:49:36 13 that done to it as I look at it. So tell me about exhibit --

11:49:41 14 Plaintiffs' Exhibit 8.

11:49:42 15 MR. CONNOR: Sure, Your Honor. So this is

11:49:47 16 regrettably somewhat confusing. The termination notice is the

11:49:51 17 one-page document that is signed --

11:49:54 18 THE COURT: All right.

11:49:54 19 MR. CONNOR: -- and does not have a "draft" watermark

11:49:57 20 on it.

11:49:58 21 THE COURT: Okay.

11:49:59 22 MR. CONNOR: The document that's titled Agreement

11:50:01 23 that is behind it is the unsigned license agreement that --

11:50:06 24 THE COURT: That was never signed.

11:50:07 25 MR. CONNOR: That's correct, Your Honor.

11:50:09 1 THE COURT: Okay. And then what is the document that
11:50:13 2 comes after that that's part of the exhibit that says NSS
11:50:22 3 agreement with Gibraltar family of companies that does appear
11:50:26 4 to be signed by both Bill Neusch and Stephen Neusch?

11:50:30 5 MR. CONNOR: That is the 2010 license agreement
11:50:33 6 between the defendant, NEU Security Services, and Gibraltar
11:50:37 7 that you heard some testimony about was the initial agreement
11:50:41 8 that they had under which they operated until around 2013 when
11:50:47 9 they began negotiating the unsigned license agreement.

11:50:53 10 THE COURT: All right. So at some point -- well, are
11:50:59 11 you in agreement with Ms. Ghavimi that the list that she showed
11:51:03 12 earlier in her questioning of Mr. Stephen Neusch which did not
11:51:12 13 have a exhibit mark on it is in fact the four products at issue
11:51:15 14 here?

11:51:15 15 MR. CONNOR: Yes, Your Honor. That is page 12 in
11:51:18 16 the -- the version we were just looking at that's addendum A
11:51:25 17 that has a title Exclusive Products.

11:51:28 18 THE COURT: Well, it was in a little bit different
11:51:32 19 form than what I'm looking at here, probably a little bit more
11:51:42 20 understandable form the way she had it depicted. But then it's
11:51:47 21 your job to show me where those four products are included in
11:51:55 22 the one-page termination agreement.

11:52:03 23 MR. CONNOR: Yes, Your Honor. I'll get right to
11:52:04 24 that.

11:52:05 25 MS. GHAVIMI: Your Honor, I'd just like to correct

11:52:06 1 for the record that Plaintiffs' Exhibit 8 has three separate
11:52:08 2 documents that were not attached to each other in any way.

11:52:11 3 THE COURT: No, no. I understood that. I understood
11:52:13 4 that. There's the notice, there's the draft agreement, and
11:52:16 5 then there's the 2010 agreement.

11:52:19 6 MR. CONNOR: Yes, Your Honor.

11:52:19 7 THE COURT: And they all came separately. They were
11:52:21 8 not ever attached to one another. That's the way I understood
11:52:24 9 it.

11:52:25 10 MS. GHAVIMI: Okay.

11:52:27 11 MR. CONNOR: Correct.

11:52:27 12 THE COURT: All right. You may proceed.

11:52:28 13 Q. (BY MR. CONNOR) Mr. Neusch, do you have Exhibit Number 8
11:52:36 14 in front of you?

11:52:38 15 A. Yes.

11:52:38 16 Q. You know what? I'm going to make this a little bit
11:52:42 17 clearer for the record and ask you to turn to Exhibit
11:52:44 18 Number 78. We looked at this earlier. This is the termination
11:53:15 19 notice that you sent after you signed back to Jim Bryer at
11:53:24 20 Gibraltar, correct?

11:53:25 21 A. That is correct.

11:53:25 22 MR. CONNOR: Okay. So this version, Your Honor,
11:53:28 23 Exhibit 78, is a clean and authenticated and I think we can
11:53:37 24 agree version of the termination notice February of 2015.
11:53:40 25 That's exhibit -- Plaintiffs' Exhibit 78.

11:53:49 1 THE COURT: Okay.

11:53:50 2 MR. CONNOR: Now may I proceed, Your Honor?

11:53:52 3 THE COURT: You may.

11:53:52 4 Q. (BY MR. CONNOR) Now, I'd like you to turn to exhibit

11:53:56 5 Number 127.

11:54:02 6 A. So we're not doing Exhibit Number 78. 127?

11:54:20 7 Q. Yes. Now, Plaintiffs' Exhibit Number 127, Mr. Neusch, is

11:54:38 8 an e-mail from you to your father and Jim Bryer August 29th,

11:54:44 9 2013, attaching your last round of revisions to the license

11:54:51 10 agreement, correct?

11:54:52 11 A. That's correct.

11:54:53 12 Q. And if you'll turn to addendum A, in that document which

11:55:00 13 is numbered at the bottom right hand corner NSS005006. Are you

11:55:09 14 there?

11:55:09 15 A. Yes.

11:55:09 16 Q. Now, this is the list of exclusive products that we've

11:55:17 17 been talking about and that His Honor just asked to clarify; is

11:55:22 18 that correct? Do you agree with me?

11:55:23 19 A. This -- yes.

11:55:25 20 Q. Okay. Now, the four disputed products that we have been

11:55:31 21 talking about are on this list. Would you agree?

11:55:37 22 A. They're down in the subsection that wasn't sold to

11:55:39 23 Betafence and that we have rights to worldwide.

11:55:42 24 Q. Well, this is one list, isn't it? Look at it.

11:55:45 25 A. That is correct.

11:55:45 1 Q. And you sent this back to Gibraltar on August 29th, 2013
11:55:51 2 and said these are my changes. You didn't make any changes to
11:55:54 3 this list. This is the last list you looked at.

11:55:57 4 A. We never disputed this list, no.

11:55:59 5 Q. You never disputed this list?

11:56:01 6 A. No.

11:56:01 7 Q. And the wedge barrier that's a disputed product in this
11:56:04 8 case is right at the top of the second part of the list where
11:56:12 9 it says M50 P1 wedge barrier, 8-foot and 14 1/2-foot, correct?

11:56:17 10 A. That is correct.

11:56:18 11 Q. And the vertical lift barrier just down from that, 24-foot
11:56:26 12 and 50-foot, those are the two disputed products that we've
11:56:30 13 been talking about that are also referred to as the restraint
11:56:33 14 barrier, correct?

11:56:35 15 A. Uh-huh.

11:56:35 16 Q. And the last of the four disputed products is the M50 P2
11:56:42 17 fence, which is the second from the top, correct?

11:56:44 18 A. That is correct.

11:56:45 19 Q. So you would agree with me that all four of the disputed
11:56:49 20 products are on addendum A in Exhibit 127?

11:56:55 21 A. Yes.

11:56:55 22 Q. Okay. Now, let's go back to the termination notice now.

11:57:02 23 A. Okay.

11:57:03 24 Q. And just so it's clear on the record, what we've been
11:57:05 25 looking at is the license agreement that you had been

11:57:08 1 negotiating from 2013 until February of 2015, correct?

11:57:12 2 A. And then in this version of the negotiation by the front

11:57:15 3 e-mail where I sent it back to Gibraltar, I think my biggest

11:57:20 4 complaint was is they tried to put -- wanted to put a

11:57:25 5 noncompete in there and I said that's ridiculous. That's all I

11:57:28 6 do, is force protection work. You would have to agree to sell

11:57:31 7 me these products for the noncompete period at better than

11:57:34 8 market price or else it would essentially try to put me out of

11:57:37 9 business if I would ever sign a noncompete. So they added that

11:57:40 10 in there.

11:57:41 11 Q. But you didn't try to change the list of exclusive

11:57:43 12 products that was the subject of license agreement, did you?

11:57:46 13 A. No.

11:57:46 14 Q. Go back to PX-8, the termination notice.

11:57:49 15 A. Okay.

11:57:50 16 Q. Yeah. The termination notice -- let me know when you have

11:57:55 17 it in front of you.

11:57:56 18 A. I do.

11:57:57 19 Q. I'm sorry. I've been corrected. Thank you. Exhibit 708?

11:58:00 20 A. You left it open from the last time.

11:58:02 21 Q. Thank you. Perfect. You're a step ahead of me?

11:58:06 22 THE COURT: So which exhibit are we looking at?

11:58:10 23 MR. CONNOR: We're been looking at Plaintiffs'

11:58:11 24 Exhibit 78, Your Honor.

11:58:12 25 THE COURT: All right. And the termination agreement

11:58:14 1 part of that is the one that's numbered Gibraltar 0010920; is
11:58:19 2 that correct?

11:58:20 3 MR. CONNOR: Correct.

11:58:21 4 Q. Now, the termination notice refers to the license
11:58:29 5 agreement that we just looked at. Would you agree with me,
11:58:36 6 Mr. Neusch?

11:58:36 7 A. The termination, it does refer to that. It refers to all
11:58:39 8 agreements because it wants to make sure it cancels my right to
11:58:42 9 sell the products that Gibraltar sold to Betafence on my own.

11:58:49 10 Q. Let me stop -- stop you there, Mr. Neusch, because --

11:58:52 11 MR. CONNOR: Object to that as nonresponsive,
11:58:54 12 Your Honor.

11:58:55 13 Q. So this agreement -- let's read the second paragraph, the
11:59:02 14 first sentence together. "By this notice, Gibraltar
11:59:05 15 immediately terminates any and all licensing or other
11:59:10 16 contractual rights which NSS may have to so use Gibraltar
11:59:15 17 products under this proposed agreement." And that proposed
11:59:21 18 agreement is the agreement we just looked at, right?

11:59:24 19 A. Yes.

11:59:24 20 Q. So by this language in the termination notice, Gibraltar
11:59:30 21 was terminating all of the rights that NEU Security Services
11:59:34 22 would have had under that license agreement and that license
11:59:39 23 agreement covered all of those exclusive products in
11:59:43 24 addendum A, correct?

11:59:44 25 A. Well, that's not correct because if you go on down, it

11:59:47 1 talks about the products being sold to Beta and, if we wanted
11:59:51 2 to buy those products, we would have to get them from Beta.
11:59:55 3 Also the -- Gibraltar continued selling me these products, so
11:59:59 4 they're sitting here lying to the Court if they try to act like
12:00:02 5 it's anything different. I have proposals from when we
12:00:05 6 negotiated on the wedge barrier and other products post this
12:00:09 7 date. So they continued selling me those products. Those
12:00:12 8 products were never at issue with this termination. The
12:00:15 9 termination was only meant, as per my father and what he said,
12:00:18 10 to terminate the products that were sold to Betafence.

12:00:25 11 Q. Mr. Neusch --

12:00:25 12 A. Yes. I know they're trying to make their case based on
12:00:30 13 these -- all the products, which would be great. But it's not
12:00:32 14 true.

12:00:33 15 Q. Where is the language in the termination notice that says
12:00:38 16 that NEU Security Services was only terminated as to the -- its
12:00:47 17 rights on the products that were sold to Betafence. It doesn't
12:00:50 18 say that anywhere, does it?

12:00:53 19 A. It talks about Betafence down at the -- the end of it, and
12:00:57 20 that's what the intent of this termination was.

12:01:00 21 THE COURT: All right. Ladies and gentlemen, at this
12:01:01 22 time we're going to be in recess until 1:30.

12:01:04 23 (Recess)

13:29:59 24 (Open Court)

13:29:59 25 THE COURT: Mr. Connor, you may continue.

13:30:01 1 MR. CONNOR: Thank you, Your Honor.

13:30:02 2 MR. TAYLOR: Judge, I need to bring something to your

13:30:04 3 attention. Mr. Reynolds has a funeral to go to this afternoon,

13:30:08 4 and wanted to put him out of order so he could make that

13:30:11 5 appointment with the Court's permission.

13:30:13 6 THE COURT: Ms. Ghavimi?

13:30:15 7 MS. GHAVIMI: No objection, Your Honor.

13:30:15 8 THE COURT: All right. You may do that.

13:30:17 9 MR. TAYLOR: And he had one more question of him and

13:30:20 10 then we're going to put on Mr. Reynolds and we'll reserve the

13:30:21 11 rest until after Mr. Reynolds.

13:30:23 12 THE COURT: That will be fine.

13:30:24 13 Q. (BY MR. CONNOR) Mr. Neusch, in going through the books and

13:30:29 14 records of your companies recently, some charges apparently

13:30:35 15 show for repeated expenses through iTunes for about 104, 105

13:30:44 16 dollars, one after another to the tune of perhaps thousands of

13:30:49 17 dollars on many of the same days. Do you know what those are?

13:30:57 18 A. Yeah. That is -- I actually have a dispute with Apple

13:31:00 19 right now because they like to double-charge whenever you

13:31:02 20 purchase something for an in-app game.

13:31:04 21 Q. Is that Game of War?

13:31:06 22 A. Yes.

13:31:07 23 MR. CONNOR: No further questions, Your Honor.

13:31:09 24 THE COURT: All right. Do you intend to recall

13:31:11 25 Mr. Neusch?

13:31:12 1 MR. CONNOR: No, sir.

13:31:12 2 THE COURT: All right. You may step down.

13:32:23 3 (Witness sworn)

13:32:23 4 **RONALD REYNOLDS,**

13:32:23 5 having been first duly sworn, testified as follows:

13:32:23 6 **DIRECT EXAMINATION**

13:32:23 7 **BY MR. TAYLOR:**

13:32:23 8 Q. Good afternoon, Mr. Reynolds. You have performed certain
13:32:35 9 court-ordered auditing functions in this case, have you not?

13:32:38 10 A. Yes. My staff has.

13:32:40 11 Q. And the first thing you did, if you'll take a look -- and
13:32:43 12 I'm going to try to go quickly because I know you're in a
13:32:47 13 hurry -- Exhibit Number 92, is that a letter report that you
13:32:50 14 did concerning certain transactions?

13:32:52 15 A. That is correct.

13:32:53 16 Q. And if you'll look at Exhibit Number 92 in the book, and
13:32:59 17 I'll look at this one.

13:33:01 18 With respect to this report, did you find that
13:33:04 19 certain transactions were reversed or put on the books and
13:33:09 20 records of the NSS and BSP out of the ordinary course of
13:33:16 21 business?

13:33:16 22 A. During April 6th, 7th, and 8th, I found that the entries
13:33:23 23 were made, as noted on your letter and on my letter, as it
13:33:28 24 relates to increases and decreases. And I did determine that
13:33:31 25 they were not in the normal course of business.

13:33:34 1 Q. All right. And since that time -- and you also found that
13:33:39 2 those were material, did you not?

13:33:41 3 A. "Material" is an auditing word. And what I said was, as
13:33:47 4 it relates to the assets and liabilities, we usually use the
13:33:51 5 term 10 percent, and they were not over 10 percent. But as it
13:33:55 6 relates to retained earnings, it was more than 10 percent, and
13:33:59 7 I said that would be -- in auditing term, would be material.

13:34:01 8 Q. All right. Now, since that time you have also done some
13:34:06 9 additional work according to an agreed procedures examination,
13:34:11 10 have you not?

13:34:12 11 A. Yes.

13:34:12 12 Q. And then you issued a report, which is Plaintiffs' Exhibit
13:34:15 13 Number 94. I believe that was issued last Friday; is that
13:34:19 14 correct?

13:34:20 15 A. I don't know. I've issued two letters -- two reports.

13:34:24 16 Q. Yes.

13:34:24 17 A. One last Friday and one this -- one last Friday and one
13:34:28 18 the previous Friday.

13:34:29 19 Q. Okay. Let's take a look at the one you issued on the
13:34:32 20 29th.

13:34:33 21 A. You want me to ...

13:34:34 22 Q. That's Exhibit Number 94.

13:34:36 23 A. Okay.

13:34:37 24 Q. In terms of your trying to perform functions, were there
13:34:49 25 certain records that were not available to you in order to

13:34:52 1 perform the audit function you were trying to perform?

13:34:56 2 A. The main record that was not available to us was bank

13:35:01 3 reconciliation, because we felt like that if we had the bank

13:35:05 4 reconciliation, we could make sure that we could tie the

13:35:08 5 activity between the different entities. And that was not --

13:35:12 6 that was not available.

13:35:13 7 Q. Did you -- you requested it? What information were you

13:35:17 8 given as to why it wasn't available?

13:35:19 9 A. They hired a temporary person to come in and to do the

13:35:23 10 bank reconciliations, and she was having difficulty in -- in

13:35:27 11 performing that function. And then on last Wednesday they

13:35:34 12 asked if we could do the bank reconciliations, and I said, no,

13:35:38 13 we could not do those. Not at this time.

13:35:41 14 Q. Were you -- has -- had the entities filed tax returns for

13:35:45 15 the years 2014 and '15?

13:35:47 16 A. They told us that they had not filed tax returns, and we

13:35:50 17 could not find documentation of tax returns being filed.

13:35:54 18 Q. Is that -- would you say that that is ordinary and

13:35:56 19 customary for a going concern, not to file a 2014 return by

13:36:00 20 this time?

13:36:02 21 A. It's not ordinary. It's -- most people file their tax

13:36:05 22 returns.

13:36:05 23 Q. And did they tell you of any plan to file returns or when

13:36:10 24 they would be filed?

13:36:11 25 A. They did not personally tell me.

13:36:13 1 Q. All right. With respect to what you found last week --
13:36:18 2 and I don't think it's in your report -- did you find charges
13:36:21 3 to -- numerous charges to iTunes on the books and records of
13:36:25 4 BSP?

13:36:26 5 A. We were -- we received the bank -- bank activity from
13:36:31 6 January 1st to May 31st for BSP, and there were a number of
13:36:38 7 small charges to iTunes.

13:36:39 8 Q. Were they repeated over and over, like in a single day,
13:36:43 9 maybe hundreds of charges to iTunes?

13:36:46 10 A. I don't know whether it was hundreds of charges.

13:36:48 11 Q. Hundreds of dollars?

13:36:49 12 A. Okay. Yeah. There was probably five or six in one day.

13:36:54 13 Q. And they were all over \$100, more or less?

13:36:57 14 A. I don't remember the dollar amount right now.

13:37:03 15 Q. All right. Didn't you advise us that the charges were in
13:37:05 16 the range of about 105 to 110 dollars per charge?

13:37:08 17 A. Per your call to me, that may be correct. I just don't
13:37:11 18 remember the exact dollar amount. In fact I think it was 104
13:37:16 19 dollars and 50-some-odd cents now that my memory comes back.

13:37:19 20 Q. In examining the books and records of BSP and NSS, did you
13:37:26 21 find the certain -- that the credit -- personal credit card
13:37:31 22 bills of Stephen Neusch and his wife had been paid by the
13:37:35 23 companies?

13:37:36 24 A. There were a number of credit card bills that were paid by
13:37:39 25 the company. But in almost all cases, the credit card bills

13:37:45 1 were charged back to their membership draw. Although there
13:37:50 2 were a number of payments that were credited back to -- to be
13:37:56 3 allocated accounts payable which created a debit balance in a
13:38:00 4 credit account if we want to -- if that answers your question.

13:38:05 5 Q. Let's take a look at the next to the last paragraph on
13:38:08 6 your report in Exhibit Number 94. It says, "We reviewed and
13:38:12 7 addressed the negative accounts payable. The total negative
13:38:15 8 accounts payable of 488,000, these negative accounts are for
13:38:20 9 charge backs. NSS has no active attempt to collect."

13:38:23 10 Let's address that first. Okay?

13:38:25 11 A. Okay.

13:38:25 12 Q. Now --

13:38:25 13 A. Now, that's different than --

13:38:27 14 Q. I understand.

13:38:27 15 A. -- what I just now mentioned.

13:38:28 16 Q. I understand.

13:38:29 17 A. Okay.

13:38:29 18 THE COURT: Wait, wait. One at a time, please.

13:38:31 19 Q. (BY MR. TAYLOR) With respect to that sentence, that would
13:38:34 20 have reduced the liability on the books if they -- if they make
13:38:37 21 these charge backs, correct?

13:38:38 22 A. That is correct. In essence, by being a negative -- a
13:38:42 23 deficit accounts payable, it becomes a receivable. And we were
13:38:47 24 told that there has been no effort to collect. It's like
13:38:51 25 overpaying people, and that's -- it's a deficit.

13:38:56 1 Q. Is it appropriate to leave that on your books like an
13:39:00 2 account receivable if there's no effort to collect it?

13:39:03 3 A. No.

13:39:04 4 Q. The next sentence says, "Additionally, NSS has a negative
13:39:09 5 balance and unallocated credit cards for \$139,000. Most of
13:39:15 6 this balance should be reclassified to member draw."

13:39:17 7 Do you see that?

13:39:18 8 A. That's correct.

13:39:19 9 Q. So were these credit card charges that were made for the
13:39:25 10 benefit of Mr. Neusch and his wife?

13:39:29 11 A. They were -- they looked to be for them -- specifically
13:39:34 12 for them.

13:39:35 13 Q. By the way, were you ever provided -- you did request the
13:39:38 14 credit card -- the backup statements for the credit card
13:39:41 15 charges that were made on those credit cards, didn't you?

13:39:44 16 A. Yes. And we asked for documentation as for the original
13:39:48 17 information to back up the credit cards. I don't believe that
13:39:51 18 is available. We also were told that some of that information
13:39:55 19 may not be there because Gibraltar may have that.

13:39:59 20 Q. You wanted to get the backup information to justify these
13:40:02 21 credit card charges that were charged to the company, correct?

13:40:05 22 A. That is correct.

13:40:06 23 Q. Was it provided to you?

13:40:08 24 A. No.

13:40:08 25 Q. And there's still around -- more or less about \$140,000

13:40:14 1 that you say in unallocated charges; is that correct?

13:40:20 2 A. The unallocated charges need to be moved to a member draw

13:40:24 3 as a distribution.

13:40:25 4 Q. All right. As of -- when you examined the books, they

13:40:28 5 were not classified as member's draw, were they?

13:40:31 6 A. That is correct. They're the deficit. It's a separate

13:40:35 7 account that was on the accounts payable books as a deficit --

13:40:38 8 it's a separate account payable listing which is a deficit -- a

13:40:42 9 debit in an account payable account.

13:40:45 10 Q. And do you have the backup or were you ever provided the

13:40:47 11 backup or charges that relate to those charges?

13:40:50 12 A. We only looked at the -- at the payments.

13:40:56 13 Q. Now, you also reviewed some transactions between NSS and

13:41:03 14 BSP on the Richmond job. Do you recall that?

13:41:05 15 A. Yes.

13:41:06 16 Q. And do you recall reviewing -- I think you included in

13:41:10 17 your report a copy of the contract between NSS and BSP, did you

13:41:15 18 not?

13:41:15 19 A. That is correct.

13:41:16 20 Q. And did you notice who executed that contract for NSS?

13:41:21 21 A. Both of them were signed -- both sides were signed by

13:41:25 22 Stephen Neusch.

13:41:26 23 Q. And with respect to the performance of that contract,

13:41:32 24 did -- was it indicated to you that NSS was going to perform

13:41:37 25 its obligations for a fixed price of \$45,000?

13:41:40 1 A. We saw the -- we saw the contract amount, and we asked the
13:41:44 2 question as it -- I want to try to answer if I can. But the --
13:41:48 3 we saw the contract for the small amount. We were told that
13:41:51 4 that was a fixed fee was -- and it was negotiated by somebody
13:41:56 5 else. So we went to the contract and saw that the contract was
13:41:59 6 signed both sides by Mr. Neusch.

13:42:02 7 So then we kind of looked at the expenditure side,
13:42:05 8 and we saw that the expenditure side on it was rather excessive
13:42:10 9 as compared to the revenue side. And we haven't -- we were
13:42:14 10 told that it was a fixed amount, and they could not raise it
13:42:17 11 any more.

13:42:17 12 Q. Well, isn't the bottom line that NSS realized a large loss
13:42:23 13 as a result of that contract?

13:42:25 14 A. They lost about -- well, the books -- their books say they
13:42:29 15 have \$156,000 in excess expenses over revenue.

13:42:34 16 Q. And BSP on the other hand booked a profit from that; is
13:42:38 17 that correct?

13:42:38 18 A. Of approximately \$91,000.

13:42:40 19 Q. Are you aware that -- I take it you are aware that NSS has
13:42:51 20 got several creditors?

13:42:53 21 A. Yes.

13:42:53 22 Q. In excess of -- you know, I think you told us on Friday
13:42:58 23 that their current exposure is 5- to 10-million dollars to
13:43:01 24 creditors?

13:43:02 25 A. Well, on the books I believe -- and I don't see it here,

13:43:06 1 and it's back there in my -- I brought a few notes, but I know
13:43:09 2 I can't bring them up here. But I think on the books they have
13:43:13 3 about \$5 million on the accounts payable books.

13:43:19 4 Q. And that would be on the books of NSS, correct?

13:43:22 5 A. That's the books of NSS.

13:43:23 6 Q. And NSS is a company where they had the large loss on that
13:43:27 7 Richmond job, correct?

13:43:28 8 A. Yes.

13:43:28 9 Q. And then they booked the profit over on BSP, correct?

13:43:32 10 A. Yes.

13:43:33 11 Q. And BSP, does it have any creditors?

13:43:35 12 A. I did not see any, but I did not -- I will attest I don't
13:43:41 13 know that I've seen those.

13:43:42 14 Q. Okay. Well, let's put it this way: You did see the books
13:43:46 15 pertaining to NSS as to what their debts were, and it was very
13:43:50 16 large, at least \$5 million, on their books?

13:43:53 17 A. Right at \$5 million. That's correct.

13:43:55 18 Q. And at the end of 2014, you looked at the financial
13:43:59 19 statements and they were underwater at the end of 2014 as well,
13:44:02 20 weren't they?

13:44:03 21 A. That is correct.

13:44:03 22 THE WITNESS: "Underwater" meaning, from a technical
13:44:06 23 term, Judge, where their assets were less than their
13:44:09 24 liabilities.

13:44:10 25 Q. (BY MR. TAYLOR) Okay. And so would it be fair to say

13:44:12 1 that, at the time that Mr. Neusch entered into this transaction
13:44:16 2 between himself on one side he's wearing his hat with NSS and
13:44:21 3 he's signing a contract that we'll do this for 45,000, and then
13:44:24 4 on the other side where he's got his hat for BSP, that NSS was
13:44:29 5 very insolvent at that point in time?

13:44:32 6 MS. GHAVIMI: Objection, Your Honor. Calls for a
13:44:34 7 legal conclusion.

13:44:38 8 Q. (BY MR. TAYLOR) Let me -- in examining the books and
13:44:40 9 records, did you see that the liabilities greatly exceeded the
13:44:43 10 assets at that time?

13:44:44 11 A. That's correct.

13:44:46 12 Q. And would it be fair to say that had -- that had the
13:44:53 13 contract all been done at one entity, there would have been
13:44:54 14 more -- the assets of NSS would have gone up had it all been
13:45:00 15 done in one entity?

13:45:01 16 A. According to the books that we looked at, that is correct.

13:45:04 17 Q. All right. Now, did you take a look at the -- the tattoo
13:45:13 18 shop? Were there certain transactions that were
13:45:15 19 mischaracterized as to the tattoo shop?

13:45:18 20 A. Yes.

13:45:18 21 Q. Would you please advise the Court of that.

13:45:21 22 A. The -- on the April 6th, 7th, and 8th, when the
13:45:25 23 adjustments were made, the expenditures to the tattoo shop and
13:45:32 24 some other places -- I'll have to go look at my notes -- they
13:45:35 25 were all put back into a loan to the tattoo shop. We asked for

13:45:39 1 a copy of the loan to the tattoo shop, and we found that that
13:45:44 2 was a loan between the tattoo shop and Mr. Neusch. And so we
13:45:48 3 recommend that -- per our notes, that that number needs to be
13:45:53 4 changed to member distribution as well.

13:45:55 5 Q. Would it be fair to say, Mr. Reynolds, that based upon
13:45:58 6 your examination of these records, including the credit card
13:46:01 7 charges and the tattoo shop, that there's been a fair amount of
13:46:05 8 commingling between the personal and the business between
13:46:08 9 Mr. Neusch and NSS and BSP?

13:46:11 10 MS. GHAVIMI: Objection, Your Honor, calls for a
13:46:13 11 legal conclusion.

13:46:15 12 MR. CONNOR: I disagree.

13:46:17 13 THE COURT: Well, I don't think it calls for a legal
13:46:19 14 conclusion, it calls for a conclusion. But I find that
13:46:21 15 Mr. Reynolds is capable of drawing that conclusion. So I'll
13:46:24 16 overrule the objection and allow the question to be answered.

13:46:27 17 A. Let me answer it this particular way: There was a
13:46:29 18 substantial amount of personal activity that was running
13:46:33 19 through the company, which -- there was a substantial amount of
13:46:36 20 activity running through the company, whether coded correctly
13:46:40 21 to a member distribution or to expenditures. There is that.

13:46:43 22 Q. All right. Now, you also said, I think, that Mr. Neusch
13:46:47 23 and his wife were taking about \$200,000 a year out in salary;
13:46:52 24 is that correct?

13:46:53 25 A. That's what the W-2 said.

13:46:54 1 Q. All right. And in addition to that, they drew out of
13:46:58 2 capital about a million dollars over a period of like 18
13:47:02 3 months; is that correct?

13:47:03 4 A. They have taken distribution. I don't know the exact
13:47:05 5 dollar amount. I'd have to look it up. It's in our report.

13:47:08 6 Q. Okay. And we're going to offer these reports, and they're
13:47:11 7 already in evidence. But would you be surprised if it was more
13:47:14 8 than a million dollars during that period of time?

13:47:16 9 A. No.

13:47:16 10 Q. All right. And this was at a time when the company, you
13:47:20 11 have already testified, was basically the liabilities exceeded
13:47:25 12 the assets?

13:47:26 13 A. Yes. And I just keep qualifying that this is based upon
13:47:29 14 the records that we have received, their QuickBooks records.

13:47:33 15 Q. And isn't it fair to say that you haven't received the
13:47:36 16 records that you really wanted to do the examination that you
13:47:40 17 were asked to do?

13:47:41 18 A. We could not be -- we could not do a complete and accurate
13:47:45 19 report without the bank reconciliations.

13:47:48 20 Q. And were you ever given the -- the bank records from
13:47:53 21 Mr. Steve Neusch personally?

13:47:56 22 A. No. We were told that that was off limits.

13:47:59 23 Q. And if Mr. Neusch was receiving at his home payments for
13:48:06 24 either NSS or BSP and putting them into his personal account,
13:48:11 25 there'd be no way for you to be able to check that without

13:48:14 1 seeing those personal records, would there? Off-the-book
13:48:17 2 transactions, so to speak?

13:48:19 3 A. Well, we did see and there is -- in their documentation
13:48:22 4 there is some payments that are coming from BSP to NSS, but
13:48:28 5 there's not a deposit for the same dollar amount and some vice
13:48:33 6 versa. Whether that's accounting to be corrected later or not,
13:48:36 7 I don't know.

13:48:37 8 Q. All right. So they don't reconcile. Is that what you're
13:48:41 9 saying?

13:48:41 10 A. Correct.

13:48:42 11 Q. What type of business -- what level of business activity
13:48:47 12 did you observe going on in either NSS or BSP over the last 30
13:48:52 13 days?

13:48:57 14 A. Well, we were out there just reviewing the records of the
13:49:00 15 books that were there, so we were not looking at the activity
13:49:03 16 or who was doing what out there.

13:49:04 17 Q. Isn't it true that the bookkeeper's a contract employee?

13:49:09 18 A. That's my understanding.

13:49:10 19 Q. And now that Mr. Neusch and his wife are both contract
13:49:14 20 employees?

13:49:14 21 A. That is correct. They are.

13:49:16 22 Q. And isn't it true that you do know what amount of money
13:49:20 23 was in the bank accounts at the end of June, don't you?

13:49:23 24 A. No. Because I don't have a bank reconciliation.

13:49:26 25 Q. All right. What did the books show was -- was their

13:49:30 1 balance?

13:49:30 2 A. There was a deficit balance.

13:49:32 3 Q. At the end of June?

13:49:34 4 A. At the end of -- I did it through May 31st.

13:49:37 5 Q. Okay. A deficit balance?

13:49:39 6 A. Uh-huh.

13:49:40 7 Q. And in terms of your schedules, if you'll take a look at

13:49:47 8 your schedules that you attached to your July 29th report, you

13:49:53 9 have a -- you have one there about "altered transactions with

13:50:00 10 Stephen were primarily re-class -- were re-classed to

13:50:05 11 unallocated credit cards." Do you see that?

13:50:06 12 A. Are you on the first page?

13:50:07 13 Q. On the very first page.

13:50:08 14 A. Okay.

13:50:09 15 Q. Work paper 6002. "Altered transactions with Stephen were

13:50:15 16 primarily reclassified to unallocated accounts." Do you see

13:50:19 17 that?

13:50:19 18 A. Correct.

13:50:19 19 Q. And so were these -- just so we'll understand, was the

13:50:25 20 bookkeeping transactions that were booked originally between

13:50:32 21 the company and Stephen to transfer those to unallocated credit

13:50:38 22 card charges?

13:50:38 23 A. Correct.

13:50:39 24 Q. And so that would -- that would in effect have the effect

13:50:42 25 on the books of concealing that this money originally had gone

13:50:45 1 to Mr. -- to Mr. Neusch, correct? If you just looked at the
13:50:49 2 books and they were unallocated, you wouldn't know that that
13:50:52 3 money went to Mr. Neusch?

13:50:54 4 A. That would be correct.

13:50:56 5 Q. If the books were the way they were originally post and
13:50:59 6 they showed that the money was a member's draw or it had been
13:51:03 7 charged to him, that would have been a trail that would have
13:51:06 8 led you to that, correct? You would have seen that?

13:51:08 9 A. Correct. They would have been under distributions under
13:51:10 10 the equity position. That's correct.

13:51:13 11 Q. I'm not asking you to talk about motive, but I am asking
13:51:16 12 you to talk about what the records show.

13:51:18 13 So making that change, isn't it true that making that
13:51:20 14 change to unallocated credit cards had the effect of burying
13:51:26 15 where that money went because it's unallocated?

13:51:31 16 A. It had the effect of -- it did not have an effect on the
13:51:36 17 balance sheet on the equity position. It had an effect on not
13:51:40 18 showing that the money went to the owners.

13:51:44 19 Q. Exactly. And in terms of -- if you look at that, that
13:51:50 20 could -- the way he made those changes, one could think he used
13:51:54 21 that to pay for a legitimate business expense, correct, if it's
13:51:59 22 unallocated?

13:52:00 23 A. I guess.

13:52:01 24 Q. But if it's allocated and it goes to member's draw, that's
13:52:05 25 the member taking money out of the company and not paying a

13:52:08 1 creditor, correct?

13:52:10 2 A. I'm sorry repeat that question.

13:52:12 3 Q. If it's -- if it's a member's draw, that's not paying a
13:52:16 4 creditor with your money?

13:52:17 5 A. No. That's -- that's a distribution out of the
13:52:21 6 proceeds -- that's a cash distribution out of the business to
13:52:24 7 an owner.

13:52:25 8 Q. And that reduces the amount of money available to pay
13:52:28 9 creditors?

13:52:30 10 A. That is correct.

13:52:31 11 Q. The next sentence says, "And many of the altered entries
13:52:38 12 were to the loan to the tattoo shop."

13:52:43 13 A. The way this particular report is written is that the
13:52:47 14 first page had to do with Stephen Neusch and the activities.
13:52:51 15 And we did an audit program, and so, therefore, down below it
13:52:55 16 said -- one of the questions was: Were these transactions
13:52:57 17 altered on six through eight and, if so, identify. And that's
13:53:03 18 what we're identifying that you're talking about now.

13:53:06 19 Q. Okay. Let's turn to the second page. And you have with
13:53:12 20 Christine Neusch a charge of 2,013 for her personal car
13:53:16 21 insurance. Do you see that?

13:53:18 22 A. Yes.

13:53:18 23 Q. Did that need to be reclassified?

13:53:21 24 A. Yes.

13:53:22 25 Q. All right. Well, take a look on -- it's reference work

13:53:49 1 page 7004. I think it's on the third page.

13:53:52 2 A. Okay.

13:53:53 3 Q. \$4,000 payment expense to consumables. Do you see that?

13:53:57 4 A. Yes.

13:53:58 5 Q. This payment was for Stephen's credit card bill?

13:54:01 6 A. Correct.

13:54:02 7 Q. So a consumable would have been a legitimate business

13:54:05 8 expense?

13:54:05 9 A. Could be.

13:54:06 10 Q. And you don't know what his credit card bill was for?

13:54:10 11 A. We saw the credit card statement. And on the credit card
13:54:13 12 statement there was charge it to this, charge to this, charge
13:54:17 13 to that as far as a documentation. And -- but the total of the
13:54:24 14 documentation was actually more than the \$4,000 that was
13:54:27 15 written to him, but there was no tie as to what the expense
13:54:33 16 was.

13:54:33 17 Q. Okay. If you'll turn to the next page, and that's work
13:54:41 18 paper reference 2003.4. Is that where you did your analysis of
13:54:46 19 the Richmond job, the first entry there?

13:54:48 20 A. Yes.

13:54:48 21 Q. And it says, "Jobs were over the subcontract amount by
13:54:53 22 156,000. Subcontract between NSS and BSP was signed by Stephen
13:55:00 23 for both parties."

13:55:01 24 A. Correct.

13:55:01 25 Q. You see that?

13:55:02 1 A. Uh-huh.

13:55:03 2 Q. It says -- let's go down to 8002. "Records of BSP do not

13:55:07 3 agree with NSS. Records of BSP have a number of missing

13:55:11 4 transactions. Have not received the bank reconciliations for

13:55:14 5 NSS and BSP in a timely manner."

13:55:17 6 A. Correct.

13:55:18 7 Q. And was -- wasn't for lack of asking for it, though, was

13:55:25 8 it?

13:55:25 9 A. It was the first thing we asked for on July the 13th.

13:55:28 10 Q. How long have you been working on this?

13:55:30 11 A. July 13th.

13:55:31 12 Q. All right. And still couldn't get that reconciliation?

13:55:35 13 A. They hired a temp to try to do it and the temp was not

13:55:38 14 able to get the bank reconciled.

13:55:41 15 Q. Oh. This is -- moving along to entry 2003.3.

13:55:51 16 A. When you say entry --

13:55:53 17 Q. Well, I don't know what you call it. It says "work paper

13:55:55 18 reference."

13:55:55 19 A. Okay. You need to know that there is a work paper for

13:55:58 20 every single one of these documentations, and that's the work

13:56:01 21 paper reference of which we have a schedule that's in the --

13:56:05 22 that's in the Dropbox for everybody to see.

13:56:09 23 Q. Okay. Work paper reference 2003.3.

13:56:12 24 A. Okay. Which page?

13:56:13 25 Q. And that's page -- the pages aren't numbered, but it looks

13:56:17 1 like it's page 4.

13:56:18 2 A. Okay.

13:56:18 3 Q. Are you with me yet?

13:56:20 4 A. No. Is it under ...

13:56:24 5 Q. It says WW --

13:56:26 6 A. Well, look over on the left. We broke down the program,

13:56:28 7 and is it under Roman numeral IV? Roman numeral V?

13:56:33 8 Q. It says, "Review posting to cost of goods sold." And I

13:56:36 9 need to show you this piece of paper. It will be faster. This

13:56:40 10 is an entry that I circled. You see that one? I've circled

13:56:47 11 it?

13:56:48 12 A. Oh, okay. Okay. I've got it.

13:56:58 13 Q. All right?

13:57:00 14 A. Yes. 2003.3.

13:57:03 15 Q. And this has to do with the cost of goods sold on the --

13:57:07 16 on the Stratcom job, the \$700,000?

13:57:17 17 A. Yes. This is not the Richmond job.

13:57:19 18 Q. No. This is the Stratcom job.

13:57:21 19 A. Okay.

13:57:21 20 Q. You'll note that the first sentence you said there is NSS

13:57:24 21 did not pay Gibraltar. Do you see that?

13:57:26 22 A. Uh-huh.

13:57:27 23 Q. So the books and records do not show that -- the records

13:57:32 24 show that NSS got the \$700,000 for the materials?

13:57:36 25 A. In 2014 it was posted on the books as a payable and

13:57:41 1 expense. And in 2015, I think January 1st and May the 15th, it
13:57:47 2 was posted -- it was taken off the books.

13:57:50 3 Q. All right. And what does that mean?

13:57:53 4 A. Pardon?

13:57:54 5 Q. What does that mean, it was taken off the books?

13:57:57 6 A. The entry was reversed.

13:57:58 7 Q. Okay. Now, NSS did get the money from Stratcom, the
13:58:02 8 714,000. That's undisputed?

13:58:04 9 A. I don't know that. I didn't look that up.

13:58:07 10 Q. Well, I'm telling you that is undisputed. Mr. Neusch has
13:58:10 11 admitted that. But what you found is that NSS did not pay
13:58:14 12 Gibraltar for that material. That's the first sentence.

13:58:17 13 A. That is correct. That's what we found.

13:58:19 14 Q. There were a number of times when you asked for records
13:58:57 15 and you were told, well, Gibraltar has that?

13:58:58 16 A. Yeah. We were -- we were told that Gibraltar had a number
13:59:03 17 of the records and -- particularly because of the cancellation
13:59:06 18 of the lease. And we were asked, would you make a request to
13:59:13 19 Gibraltar for those particular records? I said I would. But
13:59:17 20 we didn't get that list until Wednesday evening of this last
13:59:21 21 week as to what Gibraltar has. And on our -- further back when
13:59:27 22 you look at our punch list, our questions and our status, we
13:59:33 23 put where -- where they said that Gibraltar had the records.

13:59:39 24 Q. And did Gibraltar cooperate with you in providing --

13:59:42 25 A. I didn't ask them.

13:59:44 1 Q. Okay. But how long did it take you to get that list from
13:59:47 2 NSS and BSP as to what Gibraltar had?

13:59:50 3 A. I don't know, but it was -- it was not quickly. But I was
13:59:54 4 asked to make that request, I said I would make the request,
13:59:58 5 and I -- but I did not get it until the evening of July -- of
14:00:02 6 Wednesday -- this last Wednesday.

14:00:07 7 MR. TAYLOR: Your Honor, I think these documents are
14:00:09 8 already into evidence, and I will pass Mr. Reynolds at this
14:00:12 9 time.

14:00:13 10 THE COURT: Ms. Ghavimi?

14:00:19 11 **CROSS-EXAMINATION**

14:00:19 12 **BY MS. GHAVIMI:**

14:00:19 13 Q. Good afternoon, Mr. Reynolds. I just have a couple of
14:00:22 14 things. Were you present on site at the NSS offices the entire
14:00:28 15 time?

14:00:28 16 A. No, I was not.

14:00:29 17 Q. Was it your employee, Mr. Bill Sullivan?

14:00:32 18 A. Yes, it was.

14:00:32 19 Q. Okay. Do you recall being -- when you were told about
14:00:36 20 Gibraltar having NSS records? Do you --

14:00:40 21 A. I don't remember. That's -- that's what I was explaining
14:00:43 22 to him. I don't remember when I was told. I remember that you
14:00:47 23 and I discussed would we make the request, and I said I would
14:00:50 24 make the request. But I didn't receive your response -- or he
14:00:55 25 didn't receive your response until Wednesday afternoon.

14:00:57 1 Q. Do you recall when we first discussed it that it was
14:01:00 2 mentioned that anything prior to 2015 would -- any records
14:01:06 3 prior to 2015 would be at Gibraltar?

14:01:08 4 A. I don't remember the date.

14:01:10 5 Q. Okay. Did -- do you recall when Mr. Sullivan made the
14:01:15 6 request to me to provide a list?

14:01:20 7 A. No, I don't.

14:01:21 8 Q. Okay. Was it the very first -- okay. You don't know?

14:01:26 9 A. No. It was not the very first day. Our request list
14:01:29 10 changed or was added as we were going forward and found
14:01:33 11 additional things. So, no, it was not at the very beginning
14:01:36 12 that we asked that. It was -- it was later on.

14:01:39 13 Q. Okay. And also do you recall the -- I just want to go
14:01:47 14 over the discussion of Stephen Neusch's personal bank
14:01:49 15 statements. Do -- do you recall being told that
14:01:52 16 Stephen Neusch's personal bank statements were off limits to
14:01:56 17 the plaintiffs but that they would be given and were given to
14:01:59 18 Mr. Sullivan?

14:02:01 19 A. No. I was under the impression that his personal bank
14:02:06 20 statements were off limits to even us and Black Security's was
14:02:14 21 for eyes only. That's what I understood.

14:02:18 22 Q. Did Mr. Sullivan tell you that Mr. Neusch's personal bank
14:02:22 23 statements were in fact given to him?

14:02:25 24 A. Were not given to him?

14:02:26 25 Q. They were.

14:02:27 1 A. No. I did not see that his personal bank statements were
14:02:30 2 given to him.

14:02:31 3 Q. Okay. And when --

14:02:32 4 A. I don't have them in my records that I remember seeing,
14:02:35 5 but I'll be glad to go back and look at that.

14:02:38 6 Q. Okay. And when -- when you visited the offices, did NSS
14:02:41 7 employees and everyone there make a concerted effort to provide
14:02:47 8 you all the records that were available?

14:02:49 9 A. Oh, I think that -- you personally I think did everything
14:02:54 10 that you could to try to move it along based upon your skill
14:02:58 11 set of accounting and what we were trying to do. And so I had
14:03:04 12 no qualms other than I was very -- I personally was disturbed
14:03:11 13 that we could not get the bank reconciliations, and that was
14:03:15 14 our first request. So everything else you tried real hard
14:03:19 15 to -- you brought in a temp to do it. So I don't have any
14:03:24 16 qualms with what you tried to provide for us.

14:03:26 17 Q. And so the -- did the temp work for a week and a half on
14:03:30 18 doing the bank reconciliations?

14:03:33 19 A. The bank reconciliations could have been done in four
14:03:37 20 hours.

14:03:37 21 Q. Okay. Was there a miscommunication about a week into
14:03:41 22 between Mr. Sullivan and the temp about the bank
14:03:43 23 reconciliations?

14:03:43 24 A. Well, the temp went in and started changing QuickBooks
14:03:46 25 because of the way QuickBooks does the bank reconciliation, and

14:03:52 1 we had to stop her because you can't change the records in the
14:03:55 2 QuickBooks that -- I mean, you're under court order not to
14:03:58 3 change them. So we had to stop her and get her to repeat it
14:04:01 4 back and get it -- start all over. But she still was not able
14:04:04 5 to do it.

14:04:05 6 Q. Okay. And then was she -- was she told to do the bank
14:04:11 7 reconciliations in Excel?

14:04:12 8 A. Yes. We told her to do the bank reconciliations in Excel
14:04:16 9 because we wanted to get them out of the changing the
14:04:19 10 QuickBooks, the postings.

14:04:21 11 Q. Okay.

14:04:23 12 MS. GHAVIMI: Nothing further.

14:04:24 13 THE COURT: Mr. Taylor?

14:04:26 14 MS. TAYLOR: Nothing further, Judge.

14:04:27 15 THE COURT: All right. Mr. Reynolds, you may step
14:04:30 16 down. Thank you.

14:04:30 17 THE WITNESS: Thank you.

14:04:32 18 MR. CONNOR: Plaintiffs call Mr. Bill Neusch,
14:04:35 19 Your Honor.

14:05:49 20 (Witness sworn)

14:05:49 21 **WILLIAM NEUSCH,**

14:05:49 22 having been first duly sworn, testified as follows:

14:05:49 23 **DIRECT EXAMINATION**

14:05:49 24 **BY MR. CONNOR:**

14:05:49 25 Q. Good afternoon, Mr. Neusch.

14:05:50 1 A. Good afternoon.

14:05:51 2 Q. I took a couple of minutes because I wanted to make sure
14:05:54 3 that you had the termination notice and then the license -- the
14:05:58 4 unsigned license agreement and specifically addendum A in front
14:06:02 5 of you.

14:06:02 6 Let's start there, and then we'll talk about the
14:06:04 7 products specifically and we'll move as fast as we can through
14:06:07 8 this.

14:06:08 9 A. Yes, sir.

14:06:08 10 Q. So you heard a lot of testimony already today, Mr. Neusch,
14:06:14 11 about what the termination agreement, Exhibit 78 there in front
14:06:19 12 of you, means. Tell us in your own words, Mr. Neusch, what was
14:06:29 13 happening that led up to this agreement?

14:06:37 14 A. Okay. Prior to the agreement, NSS's sales of Gibraltar
14:06:40 15 products I believe -- I could be a year off, but I believe it
14:06:45 16 was 2010 or '11, that they were 2.8 million. The next year it
14:06:52 17 went down to 900,000. The next year it went down to 800,000.
14:06:56 18 The next year it was almost none. So with that we had entered
14:07:01 19 into the licensing agreement that had a minimum royalty. So if
14:07:07 20 you want to keep selling our products, you have to produce a
14:07:10 21 minimum royalty. That wasn't being paid.

14:07:15 22 When I sold the products to Beta and we entered this
14:07:19 23 termination agreement it was terminating rights to all our
14:07:23 24 products. We would still sell products to Stephen just like
14:07:30 25 we'd sell to other people, but it terminated his rights to

14:07:36 1 sell, distribute, and all those products.

14:07:40 2 There was a -- that was in February. We didn't get
14:07:45 3 crossways -- February of 2015. We didn't get crossways. I
14:07:52 4 didn't realize all that was going on until December, around
14:07:59 5 December 20th of 2015. During that time we -- I gave him a
14:08:06 6 credit of \$300,000. We credited the minimum royalty payments
14:08:13 7 that we had booked on our receivables he had booked on his
14:08:18 8 payables. I gave him that credit specifically in relation to
14:08:23 9 this termination agreement.

14:08:25 10 Q. So that was consideration for his entering into this
14:08:28 11 termination agreement?

14:08:29 12 A. Correct.

14:08:29 13 Q. Okay.

14:08:31 14 A. And the fact that he lost rights to all the products, not
14:08:34 15 just what we sold Beta. In that we had that discussion
14:08:40 16 multiple times because he brought up to my attention, well, you
14:08:45 17 gave me that credit, but they're still on your books. I went
14:08:48 18 to Jim Bryer more than once and said, Jim, you're supposed to
14:08:54 19 credit NSS \$300,000. He didn't do it right away. I actually
14:08:58 20 had to go to him at Stephen's request at least twice. And Jim
14:09:05 21 can testify to that. So that was discussed over that whole
14:09:09 22 time period.

14:09:10 23 We changed -- as Gibraltar on our highway cable
14:09:15 24 barrier, we had done 100 percent of our own sales and marketing
14:09:20 25 of that product. It's been very successful. And Gibraltar

14:09:23 1 Materials with AVB products -- and I explained this to

14:09:28 2 Stephen -- that --

14:09:30 3 Q. Active Vehicle Barrier?

14:09:32 4 A. Active Vehicle Barriers, these products that we're

14:09:37 5 discussing.

14:09:37 6 -- that we had been successful. You know, his sales

14:09:40 7 were not enough. You know, I sold off to Beta, you know, the

14:09:45 8 cable-based products. But I said we're taking in-house all the

14:09:49 9 sales of the Gibraltar AVB, all these products, ourselves.

14:09:55 10 That was why he was upset. I hired Joseph Hauss, his

14:10:00 11 brother-in-law, and he expressed how that hurt him and upset

14:10:04 12 him, how I had hired Kevin Smith and now I was giving my effort

14:10:09 13 to sell these products. That was all before December 20th of

14:10:13 14 2015.

14:10:14 15 Q. And so that's during the period between February of 2015

14:10:19 16 and December of 2015?

14:10:20 17 A. That is correct. It took a big effort. I can show the

14:10:24 18 records. We hired multiple salespeople.

14:10:30 19 Q. So you were taking in-house the sales and marketing

14:10:33 20 function that NEU Security Services had been performing under

14:10:36 21 this exclusive license agreement?

14:10:38 22 A. That is correct. Because we had terminated in that

14:10:40 23 termination agreement their rights to all the products. The

14:10:43 24 termination agreement was specifically to the licensing

14:10:47 25 agreement we had been operating under.

14:10:49 1 Q. And that was to terminate all of their rights to all
14:10:54 2 exclusive products?

14:10:55 3 A. All of them.

14:10:56 4 Q. And those exclusive products are the ones listed on
14:11:00 5 addendum A in Exhibit 127 to your right there?

14:11:03 6 A. Yes, sir.

14:11:10 7 Q. And are all four of the disputed products on that list?

14:11:13 8 A. Yes, sir.

14:11:13 9 Q. Okay. Did Mr. Stephen Neusch ever mention to you or
14:11:18 10 suggest to you in any way that he had the understanding that
14:11:23 11 you heard him testify about today that the termination
14:11:26 12 agreement was limited to the cable-based products that
14:11:29 13 Gibraltar sold to Betafence?

14:11:31 14 A. Never.

14:11:31 15 Q. Mr. Neusch, how will Gibraltar be harmed if there is no
14:11:40 16 injunction in this case?

14:11:43 17 A. As I've testified previously, not today -- and
14:11:50 18 Joseph Hauss I believe testified to this as well -- that in the
14:11:53 19 marketplace we currently today have integrators that will not
14:11:59 20 talk to us because they see us connected to NSS and Stephen.

14:12:03 21 Same last names. NSS obviously used to distribute those same
14:12:08 22 products we're now trying to sell. Because of their
14:12:11 23 reputation, we have people that will not even allow us to make
14:12:16 24 an appointment with them to sit down and explain the situation.

14:12:19 25 Q. And these integrators, are these competitors of NEU

14:12:22 1 Security Services?

14:12:23 2 A. Yes.

14:12:24 3 Q. Potential customers?

14:12:25 4 A. Who are potential customers of Gibraltar. So that's one
14:12:28 5 reason we're being harmed.

14:12:32 6 Another reason we're being harmed is the competition.

14:12:35 7 Obviously if I have competition of my own product, that's going
14:12:39 8 to drive prices down. And then I have a duty to Beta, who I've
14:12:45 9 sold these products to, now that Stephen is claiming he has
14:12:49 10 rights to.

14:12:49 11 Q. Now, which -- let's talk about that duty to Betafence that
14:12:53 12 you have. Of the four disputed products, which ones were sold
14:12:57 13 to Betafence in early 2015?

14:13:00 14 A. The M50 P2 fence, the passive barrier.

14:13:06 15 Q. The other three products were not?

14:13:08 16 A. Correct.

14:13:09 17 Q. Okay. So the wedge barrier and the cable restraint
14:13:16 18 barriers are still owned by Gibraltar; is that correct?

14:13:21 19 A. Correct.

14:13:21 20 Q. And, just to be clear, the M50 P2 cable crash fence was
14:13:29 21 owned by Gibraltar until March of 2015 and is now owned by
14:13:33 22 Betafence?

14:13:34 23 A. Correct.

14:13:35 24 Q. And if you would please, Mr. Neusch, Exhibit Number 80 ...

14:13:39 25 MR. CONNOR: I would like to note for the Court, if I

14:13:42 1 may, that Exhibit Number 80 is the contract between Betafence
14:13:49 2 and Gibraltar and it's marked as "attorneys' eyes only,"
14:13:52 3 Your Honor. If I may request the Court to seal that document?

14:14:04 4 THE COURT: Well, here's what your problem is in
14:14:05 5 court. If I draft an opinion on this and I rely on Exhibit
14:14:08 6 Number 80, it's not going to be sealed. I'll just tell you
14:14:13 7 that because I'm not going to draft an order that talks about a
14:14:16 8 sealed document. So the question is, I don't mind it remaining
14:14:22 9 sealed for purposes of this hearing if you're giving it for
14:14:27 10 background. But if it's going to be a crux in the decision,
14:14:31 11 then it's going to come out. I just want you to know that.

14:14:36 12 MR. CONNOR: Thank you Your Honor.

14:14:36 13 Q. Exhibit Number 80, do you have that in front of you,
14:14:39 14 Mr. Neusch?

14:14:40 15 A. Yes, sir.

14:14:41 16 Q. That's asset purchase agreement between Betafence and
14:14:44 17 Gibraltar, correct?

14:14:45 18 A. Yes, sir.

14:14:45 19 Q. And that was executed when? Is it March 2015?

14:14:50 20 A. Yes, sir.

14:14:50 21 Q. And under that agreement, Gibraltar conveyed to Betafence
14:14:57 22 the cable-based products, including one of the four disputed
14:15:00 23 products, the cable crash fence, correct?

14:15:02 24 A. Correct.

14:15:03 25 Q. And Betafence you already testified, or I think

14:15:10 1 Mr. Stephen Neusch testified, that consideration for that sale
14:15:14 2 was in the millions of dollars?

14:15:17 3 A. Correct.

14:15:17 4 Q. And is part of the reason that these products are so
14:15:22 5 valuable is that they have these certifications that we've been
14:15:26 6 hearing about this morning?

14:15:27 7 A. Yes. Most of these jobs specify they have to have a
14:15:31 8 certification.

14:15:32 9 Q. Okay.

14:15:33 10 A. So it's a very limited pool of products that meet that
14:15:37 11 certification and have certification.

14:15:39 12 Q. And we heard a lot about the certifications, so I just
14:15:42 13 want to summarize. Did Gibraltar crash test and receive
14:15:46 14 certifications on each of these four disputed products?

14:15:50 15 A. Yes, sir.

14:15:51 16 Q. Okay. Who designed each of these four disputed products?

14:15:56 17 A. I did.

14:15:56 18 Q. Did you have any help from Mr. Stephen Neusch?

14:16:00 19 A. On the -- nothing that's covered by our patents that he
14:16:05 20 gave help on, on any of the products. He claims that the cable
14:16:11 21 restraint barrier, or we call it the vertical lift barrier, was
14:16:16 22 his design. What he brought me was a Patriot Barrier product.
14:16:22 23 If you look at that product, it's exactly the same as our
14:16:27 24 vertical lift barrier with the exception it raises a beam up
14:16:31 25 out of the ground. Ours raises an array of three cables that's

14:16:37 1 covered under our patent.

14:16:39 2 Q. Now, the Patriot is a competitive product.

14:16:42 3 A. It's a competitive product. So Stephen's input, he claims

14:16:45 4 that was 100 percent his design. Well, his design was here's a

14:16:51 5 competing product, Dad. We need something to compete against

14:16:54 6 this product.

14:16:55 7 Q. So you --

14:16:56 8 A. Yes. I used cables instead of a beam. So if you want to

14:17:01 9 call it in the design world prior art or his, you know,

14:17:05 10 contribution to the design, it was showing me what our

14:17:08 11 competitor was doing.

14:17:09 12 Q. And the United States Patent Office has granted you

14:17:12 13 patents -- at least one patent on your cable-based products?

14:17:18 14 A. Yes. We have patents. We have patent pendings on all

14:17:22 15 these products.

14:17:22 16 Q. So all four of these disputed products are the subject of

14:17:26 17 applications that you filed?

14:17:27 18 A. Yes.

14:17:28 19 Q. And are you the sole named inventor on each of those?

14:17:32 20 A. Yes.

14:17:32 21 Q. Okay. Now, let's a tick off the fourth to the bottom and

14:17:39 22 round this out.

14:17:40 23 Has Gibraltar sold all four of these products?

14:17:44 24 A. Yes.

14:17:45 25 Q. Okay. And has --

14:17:48 1 A. When you say sold, you mean we offer them for sale and
14:17:51 2 have sold them?

14:17:52 3 Q. Yeah.

14:17:53 4 A. Yes.

14:17:53 5 Q. And the three products that were exclusive to -- or the
14:17:59 6 products that were exclusive to NEU Security Services, they
14:18:04 7 were the only ones you'd sell to during the period of that
14:18:07 8 exclusive license agreement; is that correct, in the
14:18:10 9 United States?

14:18:10 10 A. Ask that question again. I'm sorry.

14:18:12 11 Q. Sure. I trailed off there.

14:18:14 12 During the period of the exclusive license for the
14:18:18 13 exclusive products that are on Exhibit Number 127 there, NSS
14:18:24 14 was your only customer in the United States because they had an
14:18:29 15 exclusive, correct?

14:18:31 16 A. Yes. On the -- three of the products they had exclusive
14:18:37 17 worldwide, and on the cable-based product they had exclusive
14:18:42 18 just in the United States because Beta had it in the rest of
14:18:45 19 the world.

14:18:46 20 Q. Outside the U.S.?

14:18:48 21 A. Outside the U.S.

14:18:49 22 THE COURT: Now, in order that I understand what
14:18:52 23 you're talking about, when I look at the addendum A, it
14:18:56 24 describes that. And so roughly the first half of the sheet it
14:19:01 25 says U.S. only, Betafence outside U.S. is just what you've

14:19:05 1 referred to as the cable products; is that right? And then the
14:19:10 2 remainder which says worldwide are the other products?

14:19:15 3 THE WITNESS: Correct. Worldwide would cover the
14:19:19 4 finger wedge barrier, the two cable restraint barriers. So
14:19:26 5 these four products, that would be all in the worldwide column.

14:19:29 6 THE COURT: And the cable restraint barriers are what
14:19:32 7 are referred to on addendum A as vertical lift barriers?

14:19:37 8 THE WITNESS: Correct. It's called pop-up.

14:19:40 9 THE COURT: And the finger wedge barrier is referred
14:19:41 10 to as the wedge barrier, and the cable crash fence is referred
14:19:45 11 to as the second item, the P2 fence; is that correct?

14:19:51 12 THE WITNESS: That is correct.

14:19:52 13 THE COURT: Okay. You may proceed.

14:19:58 14 Q. (BY MR. CONNOR) So that Betafence agreement, you conveyed
14:20:02 15 the M50 P2 cable crash fence and that cable-based line of
14:20:06 16 products?

14:20:07 17 A. Uh-huh.

14:20:08 18 Q. And you have a duty to Betafence, as you mentioned a few
14:20:13 19 minutes ago, to defend what you sold to them; is that --

14:20:18 20 A. Yes, sir.

14:20:18 21 Q. -- fair?

14:20:21 22 MR. CONNOR: Pass the witness, Your Honor.

14:20:25 23 **CROSS-EXAMINATION**

14:20:25 24 **BY MR. ROGERS:**

14:20:25 25 Q. I want to make sure you have all of Defendants' Exhibits

14:21:10 1 up here.

14:21:11 2 A. I do not. Are you going to be using any of the

14:21:17 3 plaintiffs' exhibits?

14:21:18 4 Q. I think I'm only going to use defendants'.

14:22:44 5 A. Okay.

14:22:44 6 Q. Good afternoon, Mr. Neusch.

14:22:46 7 A. Good afternoon.

14:22:51 8 Q. I want to ask you about each of the four products. But

14:22:54 9 before we get there, I want to ask you first one question: The

14:22:57 10 consideration that you're referring to earlier --

14:23:02 11 A. I apologize. I didn't hear you.

14:23:05 12 Q. Can you hear me? Can you hear me now?

14:23:08 13 A. That's better.

14:23:09 14 Q. The consideration that you say was provided to your son

14:23:13 15 Stephen Neusch for his signing of the termination notice you

14:23:19 16 referred to a credit on royalties; is that correct?

14:23:27 17 A. That is correct.

14:23:27 18 Q. And you referred to that credit not being given right

14:23:29 19 away, but you had to remind someone several times to do it; is

14:23:32 20 that correct?

14:23:36 21 A. Yes. Jim Bryer, my CFO.

14:23:36 22 Q. And this credit on royalties that was the consideration

14:23:39 23 for your son Stephen Neusch signing the termination notice

14:23:43 24 agreement, that was a credit on royalties that were due under

14:23:50 25 an unsigned license agreement; is that correct?

14:23:53 1 A. The very license agreement that he signed to terminate.

14:23:57 2 That agreement that we had been operating under.

14:24:01 3 Q. Okay. But the underlying -- you said that it was an

14:24:06 4 obligation to pay royalties; is that correct? And you gave a

14:24:09 5 credit on that obligation?

14:24:11 6 A. Yes. We had billed him for the royalties, he had booked

14:24:15 7 the royalties, and then I gave him a credit. We took those --

14:24:20 8 we showed them as a receivable, we removed those as a

14:24:24 9 receivable, and subsequently he removed those as a payable.

14:24:27 10 Q. Okay. But he never agreed to pay any of those royalties

14:24:31 11 because he didn't agree to the license agreement. It was never

14:24:34 12 signed, correct?

14:24:34 13 A. It was never signed. It actually states that in the

14:24:38 14 termination agreement. We acknowledge that. But he did agree,

14:24:46 15 and that's what we were operating under. So we operated under

14:24:50 16 that agreement for a period of time, and that's what he signed

14:24:53 17 to terminate.

14:24:54 18 Q. Okay. But you say --

14:24:55 19 A. Why would you terminate something you didn't have any

14:24:58 20 agreement to do? There's nothing to terminate if there is no

14:25:02 21 agreement.

14:25:03 22 Q. Well, that's my point. You were attempting to terminate

14:25:06 23 something that was never agreed to. He never signed --

14:25:09 24 Stephen Neusch, on behalf of NSS, never signed the unsigned

14:25:14 25 license agreement because he didn't agree to the royalties. He

14:25:19 1 never would agree to them, would he? It was too much?

14:25:23 2 A. He operated under it, and he never said that. We had nine

14:25:27 3 versions of that agreement going back and forth between him and

14:25:32 4 Jim Bryer over that period of time. We operated under that

14:25:37 5 agreement.

14:25:37 6 You know, sometimes he argues, "well, according to

14:25:41 7 our agreement," and sometimes, like you are referring to now,

14:25:45 8 "well, it wasn't signed, so it wasn't an agreement." So

14:25:48 9 sometimes he's arguing it is an agreement and we need to abide

14:25:51 10 by it and sometimes he's arguing it's not.

14:25:54 11 But we operated under that agreement. We discussed

14:25:57 12 that agreement. He never told me he wouldn't signed it because

14:26:06 13 of that. It's just the can kept getting kicked down the road

14:26:09 14 as far as him signing it, and he kept -- like I said nine,

14:26:12 15 there were nine different versions with Jim Bryer.

14:26:13 16 Q. Okay. So the consideration that Gibraltar provided to NSS

14:26:21 17 for signing the termination notice agreement was a credit on

14:26:26 18 royalties that were due under a license agreement that was

14:26:31 19 never signed, correct?

14:26:33 20 A. Correct.

14:26:34 21 Q. Okay. So let's talk about the four products. The top

14:26:43 22 two, can we just refer to those as the vertical lift barriers,

14:26:47 23 the 24-foot and the 50-foot?

14:26:49 24 A. Right. I never understood why you called those two

14:26:52 25 different ones when the wedge has two different ones as well.

14:26:56 1 But yes.

14:26:57 2 Q. Well, there's -- let's talk about what these designations

14:27:01 3 are. There's M50.

14:27:06 4 A. Are you asking me what M50 means?

14:27:08 5 Q. Well, I'm going to tell you, and you tell me if I'm right.

14:27:12 6 How about that?

14:27:13 7 A. Okay.

14:27:13 8 Q. M50, that's a medium-sized truck. This is a crash test

14:27:15 9 certification, correct? This is a crash test with a

14:27:17 10 medium-sized truck traveling at approximately 50 miles per

14:27:22 11 hour, correct?

14:27:22 12 A. Yeah. That's ASTM designation. "M" stands for

14:27:28 13 medium-duty truck, 15,000 pounds. "50" is the speed, 50 miles

14:27:33 14 per hour.

14:27:33 15 Q. Okay. And in order to get your vertical lift barrier

14:27:37 16 crash test certified under this designation, it's when a

14:27:40 17 medium-sized truck traveling at approximately 50 miles per hour

14:27:45 18 hits it, and "P1" means after that hit it penetrates a little

14:27:51 19 less than 3.3 feet. Correct?

14:27:53 20 A. The front leading edge of the bed can't penetrate more

14:27:57 21 than that 3.3 feet.

14:27:58 22 Q. Okay. And that's a 24-foot, correct?

14:28:02 23 A. Correct.

14:28:02 24 Q. And that's a photograph of it, correct?

14:28:14 25 A. Yes, sir.

14:28:14 1 Q. And tell us -- tell me if I got this correct. This is a
14:28:24 2 gate, right, that you can lift up and down, vertical lift? Is
14:28:28 3 that what that refers to?

14:28:30 4 A. It's a vertical lift barrier. As I mentioned before,
14:28:34 5 there's a Patriot. If you look at it, it looks just like
14:28:36 6 that -- two hydraulic cylinders on top, two buttresses. They
14:28:41 7 use a beam in between. We used our -- when we applied our
14:28:44 8 patent, we used our patented cable system to arrest the
14:28:47 9 vehicle.

14:28:48 10 Q. Okay. And different from a fence that would cover, say, a
14:28:50 11 perimeter, this is designed as a gate to open and close to
14:28:54 12 allow vehicles to pass or not pass, correct?

14:28:56 13 A. Correct. It's an active vehicle barrier. You know,
14:29:01 14 Stephen mentioned his technology to that was the actuation of
14:29:09 15 it. Well, it's two hydraulic cylinders. There's nothing
14:29:15 16 proprietary about two hydraulic cylinders. Same on the wedge.
14:29:19 17 We tested it with a hydraulic cylinder. There's absolutely
14:29:19 18 nothing proprietary about a hydraulic cylinder. So that was
14:29:23 19 his testimony of his part of the invention earlier today.

14:29:27 20 Q. I appreciate all that, but I don't think I asked you a
14:29:31 21 question about that.

14:29:31 22 A. I'm sorry. You're correct. I'll refrain. Sorry.

14:29:35 23 Q. All right. So this is 24 feet P1. A truck can hit it at
14:29:40 24 50 miles per hour, and it will only penetrate about 3 feet,
14:29:45 25 right, when it passes this certification?

14:29:47 1 A. Correct.

14:29:47 2 Q. And this is the 50-foot, correct?

14:29:52 3 A. Correct.

14:29:53 4 Q. Twice as wide. Do you see it's not a P1 certification.

14:29:58 5 This is P2, right?

14:30:00 6 A. Correct.

14:30:00 7 Q. And that means when a 50-mile-per-hour truck hits it, it

14:30:04 8 can penetrate up to about 20 feet and still pass the

14:30:08 9 certification?

14:30:09 10 A. Seven meters.

14:30:10 11 Q. Right. And it makes sense, doesn't it, because it's twice

14:30:14 12 as wide of a gate?

14:30:15 13 A. Correct.

14:30:15 14 Q. So you're going to get further penetration with the same

14:30:17 15 truck hitting it, right?

14:30:18 16 A. Correct.

14:30:19 17 Q. Okay. This is the next product. This is the finger wedge

14:30:27 18 barrier, correct?

14:30:28 19 A. Correct.

14:30:28 20 Q. And this is a barrier -- this is like a gate, right? You

14:30:32 21 want to stop a vehicle from entering a certain --

14:30:37 22 A. It's an active roadway vehicle barrier.

14:30:40 23 Q. Okay. And the barrier lifts up and has these little

14:30:44 24 fingers here, right? That's what you refer to as the fingers

14:30:47 25 of the finger wedge, right?

14:30:49 1 A. Well, you're pointing at the cables. The fingers are
14:30:52 2 actually on top.

14:30:53 3 Q. Well, I can try to point to the backside.
14:30:56 4 Okay. Understood.

14:31:03 5 And this is a crash fence, correct?

14:31:05 6 A. Correct.

14:31:06 7 Q. So unlike the others that are made to block a truck from
14:31:09 8 entering a certain roadway, this can be like a perimeter fence,
14:31:14 9 right?

14:31:14 10 A. Correct. A passive perimeter barrier.

14:31:17 11 Q. Okay. And this -- this is a 50-mile-per-hour truck --
14:31:22 12 this certification would be a 50-mile-per-hour truck hitting
14:31:26 13 this fence and penetrating less than about 20 feet in order to
14:31:29 14 pass the certification, right?

14:31:31 15 A. Correct.

14:31:31 16 Q. Okay. So now that we've kind of got the products
14:31:43 17 straight, I want to go back and talk about the vertical lift
14:31:46 18 barriers. We're going to talk about both at the same time, the
14:31:51 19 24-foot and the 50-foot.

14:31:56 20 I want you to turn to Defendants' Exhibit 13.

14:32:16 21 A. I didn't hear the number.

14:32:17 22 Q. Defendant's Exhibit 13 in the notebook in front of you.

14:32:21 23 A. Thirteen. Okay.

14:32:25 24 Q. And I'm going to put up a highlighted version here on the
14:32:28 25 screen to direct you to the particular portions I'm talking

14:32:31 1 about, but you can refer -- you can refer to your notebook so
14:32:34 2 you have it closer in front of you or the screen, whichever you
14:32:38 3 prefer.

14:32:38 4 A. It would be easier here. So I'm here.

14:32:41 5 Q. Yeah. Let me know when you're there.

14:32:43 6 A. I'm here.

14:32:44 7 Q. And you want to turn to page 3. There's very --

14:32:51 8 A. The same as on the screen.

14:32:52 9 Q. You're on page 3?

14:32:54 10 A. Yes.

14:32:55 11 Q. Okay. So this is Plaintiffs' response to Defendants'
14:32:57 12 interrogatories. It's dated July 15th, 2016, and I want you to
14:33:02 13 look at number one here. And this -- this answer to number one
14:33:06 14 says, "Plaintiffs sold and conveyed to Betafence the
14:33:11 15 cable-based products and transferred their intellectual
14:33:13 16 property covering the vertical lift barriers to Betafence in
14:33:19 17 March 2015." That's not correct, is it?

14:33:23 18 A. Yeah. That is a mistake because they did not get the
14:33:26 19 cable restraint barrier.

14:33:32 20 Q. So let's turn --

14:33:34 21 A. I don't ever remember testifying to that because I've been
14:33:37 22 aware of that the whole time.

14:33:39 23 Q. It's just a mistake in the response, isn't it?

14:33:42 24 A. It's a mistake. Let me read it so I can verify.

14:33:45 25 Q. I think it's just a mistake, but let me know.

14:33:48 1 A. Transfer the intellectual property, well that patent
14:34:01 2 covers the vertical lift barrier. So it's not a mistake. This
14:34:05 3 is saying the intellectual property that I transferred to Beta
14:34:11 4 does cover the vertical lift barrier because the vertical lift
14:34:15 5 barrier's patent is a continuation of the '433 patent.

14:34:19 6 Q. Okay. So in this preliminary injunction proceeding, your
14:34:26 7 family of companies, the Gibraltar family of companies as
14:34:28 8 plaintiffs, is requesting that this Court enter an injunction
14:34:33 9 to stop NSS or any other of the defendants from selling the
14:34:38 10 vertical lift barriers, correct?

14:34:40 11 A. Correct.

14:34:40 12 Q. But you've sold away the patent rights to someone who is
14:34:44 13 not a plaintiff in this case who has not filed any patent
14:34:51 14 infringement claims, correct?

14:34:56 15 A. Okay. Those products still belong to me. I gave the
14:35:01 16 patent to them, but the products themselves are still mine for
14:35:07 17 my exclusive rights to sell. Okay. So you're a patent
14:35:14 18 attorney, if I understand right. You understand you don't have
14:35:17 19 to own the patent to be able to sell the product.

14:35:23 20 Q. Do you have -- when you sold the patent -- when Gibraltar
14:35:27 21 sold the patent you're referring to, what you're referring to
14:35:32 22 as covering these vertical lift barriers --

14:35:34 23 A. I sold them --

14:35:35 24 Q. Let me finish my question.

14:35:37 25 A. Okay.

14:35:37 1 Q. -- did Gibraltar get a license back? And you said
14:35:41 2 exclusive rights. Did you get an exclusive license back from
14:35:44 3 Betafence?

14:35:46 4 A. We specifically addressed I was keeping those products.
14:35:52 5 So it is -- they bought -- you're acting like the only thing
14:35:57 6 they bought was a patent. They bought the rights to very
14:36:01 7 clearly specified products. We spell it out. I kept the
14:36:05 8 rights to other products. But when they bought the rights to
14:36:08 9 those products, I gave them the patent that went along with
14:36:11 10 that. Well, that patent also is a continuation to this product
14:36:15 11 that I kept.

14:36:17 12 It was understood. They don't have any issues. I
14:36:20 13 don't have any issues. The vertical lift barrier is my
14:36:26 14 product. The patent that is a continuation for this product,
14:36:32 15 I -- it started with the cable fence that they -- that's what
14:36:35 16 they did purchase. They purchased that product, and with the
14:36:39 17 product we gave them the patents.

14:36:42 18 Q. Let me ask you to turn to page 5 in the same document and
14:37:17 19 take a look at the answer to Interrogatory Number 7. And in
14:37:25 20 this answer the question -- the question is asking for an
14:37:31 21 explanation as to the reasons for removing vertical lift
14:37:37 22 barriers from inclusion in the asset purchase agreement between
14:37:40 23 Betafence and the Gibraltar companies. Well, first of all,
14:37:47 24 let's set the premise.

14:37:48 25 A. I didn't hear you. You said, first of all, what?

14:37:50 1 Q. Let's set the premise. Vertical lift barriers were
14:37:54 2 removed from the sale agreement, except the patent was sold?
14:37:57 3 Is that -- were vertical lift barriers removed from the
14:38:02 4 Betafence sale?
14:38:03 5 A. Yes. Originally in one of the drafts it was included in
14:38:09 6 that product to go to Beta. Then I talked to Beta, and they
14:38:13 7 agreed to give it back to us, and so it's now our product.
14:38:19 8 Q. When you say "give it back," it wasn't sold and then given
14:38:26 9 back. It was just never sold, right?
14:38:28 10 A. Well, we had a letter of intent. So from the letter of
14:38:31 11 intent to execution of the final contract, there is drafts back
14:38:35 12 and forth between the two parties. In the original draft, the
14:38:41 13 vehicle -- the vertical lift barrier was included to go to
14:38:44 14 Beta. I talked to Beta. They agreed to take that out so we
14:38:49 15 could keep that product. And so in the final draft that we
14:38:53 16 signed and executed, the vertical lift did not go to Beta. We
14:38:57 17 kept that product.
14:38:58 18 Q. Okay. So the answer to this interrogatory then says, "The
14:39:02 19 reason vertical lift barriers does not appear in the asset
14:39:05 20 purchase agreement is because the plaintiffs Gibraltar wanted
14:39:08 21 to maintain the right to manufacture and sell its vertical lift
14:39:12 22 barriers, and Betafence agreed." That's the answer, correct?
14:39:18 23 A. Correct. That's exactly what I just explained.
14:39:19 24 Q. Well, that's at least partially true. Gibraltar did not
14:39:24 25 sell the vertical lift barriers to Betafence. Isn't the real

14:39:28 1 reason why you agreed -- isn't the real reason why the vertical
14:39:31 2 lift barriers were not included in the Betafence agreement, why
14:39:35 3 they were removed from the Betafence agreement, was because you
14:39:38 4 agreed with your son Stephen Neusch that the vertical lift
14:39:42 5 barrier was his idea and design?

14:39:45 6 A. That is not true. Stephen came to me. He was negotiating
14:39:48 7 a job with a vertical lift barrier. I believe it was in
14:39:51 8 California. I don't know. But my recollection was, you know,
14:39:57 9 Dad, why are you giving that one to Beta? That was my idea.
14:40:02 10 again, I explained the idea earlier. He showed me the Patriot
14:40:07 11 product. He said, That was my idea. Why are you selling that
14:40:10 12 to Beta? I said, I can ask if they don't mind. I'm not going
14:40:16 13 to hurt my deal with Beta. I said, I'll ask Beta and see if
14:40:21 14 they'll give it back.

14:40:22 15 But the reason -- it was cable based, and if you look
14:40:28 16 at our agreement with Beta, there is a lot of language about
14:40:31 17 whether the products are cable or not because we were in the
14:40:35 18 middle of developing a beam-based product. So in our
14:40:39 19 noncompete with Beta, I was clarifying cable-based products
14:40:46 20 versus noncable-based. So, originally, that was included in
14:40:51 21 there.

14:40:51 22 So when I went to Beta, I said -- you know, I
14:40:54 23 explained to them the vertical lift, and I told them we had
14:40:59 24 sold, well, three functioning and we also sold two panels, so
14:41:07 25 five variations of that barrier. So it wasn't big in the

14:41:11 1 marketplace. They agreed to give it back, no change in our
14:41:16 2 price or in our contract. It was just they agreed. No
14:41:21 3 problem. So they gave us that product.

14:41:24 4 When I say gave it back, it was originally in the
14:41:27 5 draft that they would get that. I got it back. Stephen, as I
14:41:32 6 said, was negotiating on a project. I didn't promise him I
14:41:36 7 would get it back. I said I'll ask, and I was able to do that.

14:41:40 8 Q. So you removed the vertical lift barriers from the draft
14:41:47 9 of the Betafence agreement after Stephen came to you and
14:41:54 10 objected and asserted it was his idea and design, correct?

14:41:58 11 A. He definitely mentioned it was his idea.

14:42:02 12 Q. Okay. And you removed it from the Betafence agreement?

14:42:05 13 A. He was negotiating on a job. It was not just that -- he
14:42:09 14 never claimed that that was his barrier. He hadn't claimed
14:42:12 15 that these products were his until after I found out he was
14:42:16 16 embezzling from me and everything blew up. This all -- we've
14:42:21 17 worked for years and none of these claims about these being his
14:42:25 18 products or he has rights to him that has never come up until
14:42:29 19 basically this lawsuit started.

14:42:31 20 Well, I take it back. The first I heard that he had
14:42:37 21 any intention of claiming rights to these products was a
14:42:41 22 threatening letter sent by your firm threatening to sue me
14:42:48 23 prior to me filing the lawsuit. That's what instigated this --
14:42:52 24 threatening to sue me and claiming rights to those products.
14:42:55 25 That was in, I want to say, February of this year. Prior to

14:42:59 1 that letter, he had never claimed any rights to these products.

14:43:05 2 Q. So you agree that you removed the vertical lift barriers
14:43:08 3 from the Betafence agreement after Stephen objected and
14:43:12 4 asserted that it was his idea and design.

14:43:17 5 But let's cut to the chase. You removed it --

14:43:20 6 A. It wasn't that it was his design. He had input. It was
14:43:24 7 his idea to do it. It was his idea to -- Dad, there's a
14:43:30 8 Patriot barrier in the marketplace. Let's make a competing
14:43:33 9 product. Okay? That was his input. It was, you know, a
14:43:40 10 weekend. I mean, if you just look at the two products, you put
14:43:43 11 them up side by side, you know, that's his input, was copy the
14:43:49 12 Patriot. That's -- you know, I did it with cables using our
14:43:54 13 patented technology.

14:43:54 14 Q. Let's just cut to the chase. You know that it's Stephen's
14:43:58 15 view of what went on when he objected and you removed the
14:44:01 16 vertical lift barriers from the Betafence agreement was to
14:44:04 17 preserve Stephen Neusch, NSS, and BSP's rights to the product.

14:44:12 18 A. I'm under oath before God. I never envisioned that he
14:44:18 19 thought he owned that product and could make that product
14:44:21 20 without me. It was so that I could sell him that product in
14:44:26 21 the future, not that he could go manufacture it himself.

14:44:31 22 Q. Well, let me have you take a look at Defendants'
14:44:39 23 Exhibit 25, and let's see -- let's see what you had to say.
14:44:53 24 First confirm for me, Defendants' Exhibit 25 you have it in
14:44:56 25 front of you. That's your letter to Stephen, correct?

14:44:59 1 A. Yes.

14:45:00 2 Q. And in this letter to your son Stephen, the highlighted
14:45:07 3 portion, you said, "The vertical lift barrier was your idea and
14:45:11 4 design." And you even ask, "What do you think I owe you for
14:45:15 5 the vertical lift?" That's your statement, correct?

14:45:20 6 A. Correct. This is in response to a letter he sent. So if
14:45:24 7 you put this in context, he was claiming that that was his
14:45:31 8 idea, his design. I wasn't trying to argue with him and, you
14:45:34 9 know, cut hairs. So, you know, and to be honest with you, at
14:45:40 10 that time and up until just recently, I had forgotten all about
14:45:45 11 the Patriot barrier. It was brought to my attention the design
14:45:49 12 was based around the Patriot barrier. I looked at it and then
14:45:54 13 I remember there it is. If you pull up the Patriot barrier,
14:45:59 14 it's identical. Look. It's the same barrier. That didn't
14:46:04 15 come to my attention until just recently, and that refreshed my
14:46:07 16 memory of his input into the design.

14:46:10 17 So this was in response to a letter where he was
14:46:15 18 expressing hurt feelings and he specifically brought up in
14:46:22 19 that, you know, the vertical lift barrier. And this is my
14:46:30 20 response to that.

14:46:33 21 Q. Let me ask you to turn to Defendants' Exhibit 26.

14:46:37 22 A. Just to clarify, this letter and the letter he wrote
14:46:40 23 previous to this was in a meeting --

14:46:43 24 Q. I don't have a question for you on that letter.

14:46:45 25 A. -- with my brother who is a pastor trying to reconcile the

14:46:48 1 parties.

14:46:50 2 Q. Okay. I appreciate it, but let me ask the questions and
14:46:52 3 you can give the answers.

14:46:53 4 A. I was trying to explain the context of the letter.

14:46:56 5 Q. I understand. Let me ask you to turn to Defendants'
14:46:59 6 Exhibit 26.

14:47:01 7 A. Yes, sir.

14:47:14 8 Q. So this is -- this is the draft. This is the letter of
14:47:17 9 intent, correct? If you talk about the structure --

14:47:19 10 A. No.

14:47:20 11 Q. Hold on.

14:47:21 12 If you talk about the structure of how the Betafence
14:47:24 13 sale agreement came about, you first started out with a letter
14:47:28 14 of intent and then you ended up -- eventually ended up with a
14:47:31 15 final executed Betafence sale agreement, correct?

14:47:35 16 A. Correct.

14:47:35 17 Q. And in this letter of intent, the vertical lift barrier
14:47:39 18 was included, correct? I'll show you where it is. This is the
14:47:51 19 January 26th, 2015 letter of intent. The date is at page 5.

14:47:56 20 And then let's turn to page 7. And there's two places in here
14:48:03 21 I want to direct your attention to that talk about the vertical
14:48:06 22 lift barriers. The first is at page 7 where there's
14:48:11 23 definitions of what Gibraltar's business is that you're
14:48:14 24 proposing to sell to Betafence.

14:48:18 25 And it says, "Gibraltar business means the commercial

14:48:20 1 activities of the seller relating to cable-based anti-ram crash
14:48:24 2 fence product, including ..." And it's got two categories,
14:48:37 3 cable-based gates and cable-based vertical lift barriers.
14:48:38 4 Correct?
14:48:38 5 A. And it goes on.
14:48:39 6 Q. Well, associated things relating to those two.
14:48:42 7 A. Right.
14:48:42 8 Q. But these are the two categories of things you're selling,
14:48:46 9 right?
14:48:47 10 A. Well, there's three categories. There's the fence,
14:48:50 11 there's the gates, and the vertical lift barrier.
14:49:08 12 Q. Well, it says the fence products including cable-based
14:49:09 13 gates and cable-based vertical lift barriers.
14:49:09 14 A. Fence products as the M50 P2, that's the passive
14:49:12 15 perimeter. And then we go to the active. But yeah. I'm not
14:49:16 16 trying to argue. I'm just clarifying.
14:49:18 17 Q. Minor point, right. I agree. So then let's turn to
14:49:22 18 page 12. And this is -- there's 15 products total listed. On
14:49:30 19 your page you can see all 15. But what's shown on the screen
14:49:34 20 is, in particular, 14. That's the vertical lift barrier,
14:49:37 21 correct? It's one out of 15 products specifically called out
14:49:42 22 in this letter of intent, correct?
14:49:44 23 A. Correct.
14:49:44 24 Q. So I'm going to tell you the next three exhibits I'm going
14:49:58 25 to work through so we can speed this up. I'm going to look at

14:49:59 1 Defendants' Exhibit 28, 29, and 30. And this is the
14:50:04 2 correspondence going back and forth leading to the removal of
14:50:08 3 the vertical lift barriers. So during the time period between
14:50:13 4 the January 26th, 2015 signing of the letter of intent and the
14:50:16 5 March 13th, 2015 sale, you worked with Betafence to remove the
14:50:22 6 lift barriers from the sale, correct?

14:50:25 7 A. Correct. I made a request, and they agreed.

14:50:28 8 Q. Well, the request started with Stephen, didn't it?

14:50:34 9 A. Stephen came to me, and then I made a request to Beta.

14:50:54 10 Q. NSS, correct?

14:50:55 11 A. Correct.

14:50:55 12 Q. In fact, we're going to look at one that's exactly the

14:50:58 13 same day. So this first one we're looking at is Defendants'

14:51:01 14 Exhibit 28, and this is -- tell me if I've got this right.

14:51:09 15 This is Jim Bryer at your office sending an e-mail on

14:51:12 16 February 4th, 2015 -- remember that date -- to Ramon Tico --

14:51:18 17 you can tell me if I pronounce that correct, Ramon at

14:51:21 18 Betafence -- copying you and stating that you, Mr. Neusch,

14:51:27 19 wanted to set a time for discussing NSS, the vertical lift

14:51:32 20 barrier, and the attached document, correct?

14:51:39 21 A. I'm sorry. You made a lot of statements. Are you just
14:51:43 22 asking if that's the basis of this letter? Yes. I would say
14:51:46 23 that's correct.

14:51:46 24 Q. So let's look at the attached document.

14:51:50 25 What is the attached document that you want to talk

14:51:56 1 to Betafence about? You can look on the next page. It's a
14:52:03 2 Department of Defense list of certifications for anti-ram
14:52:08 3 vehicle barriers, correct?
14:52:09 4 A. Correct.
14:52:10 5 Q. And next page is the page of certifications the page --
14:52:14 6 page 5 of 12 of certifications. And this shows the
14:52:19 7 certifications for NSS for the vertical lift barriers, correct?
14:52:24 8 A. Correct.
14:52:25 9 Q. And then the last page is the NSS certification for the
14:52:35 10 24-foot vertical lift barrier, correct? Well, not the last
14:52:38 11 page. It's the second to the last. Do you see that?
14:52:42 12 A. Are you talking about page 9. Page 9 before that?
14:52:55 13 THE COURT: I think he's talking about the one that
14:52:57 14 is numbered 9. In my copy of the exhibit the page that's
14:53:03 15 numbered 9 says data sheet one, test vehicle information.
14:53:09 16 Q. (BY MR. ROGERS) I think the exhibits must be out of order.
14:53:11 17 If you look at Bates number in the lower right-hand corner, it
14:53:15 18 should go --
14:53:15 19 A. When it's up there, I can find it. I've got it.
14:53:18 20 Q. Okay. So just to make sure we're literally on the same
14:53:21 21 page, Bates Number Gibraltar 151 --
14:53:31 22 A. This is the report that NSS had KARCO change.
14:53:37 23 Q. You mean Gibraltar's employee had KARCO change?
14:53:42 24 A. Well, that employee was paid by me, but I think I saw him
14:53:47 25 twice. He worked out of Stephen's office under Stephen's

14:53:51 1 direction by our agreement. So he was directed by Stephen, and
14:53:54 2 he also was doing business for NSS. I never directed him to
14:53:58 3 have these reports changed, didn't know anything about it.

14:54:24 4 Q. That's the same day Gibraltar sent the notice of
14:54:26 5 termination to NSS, correct?

14:54:28 6 A. I'm sorry. What document are you looking at now?

14:54:32 7 Q. Well, I'm referring to the document we just got done with.
14:54:36 8 It was a February 4th, 2015 e-mail. And I'm asking, you
14:54:41 9 recognize, I think you already did testify, that you understand
14:54:44 10 that was the same day that the notice of termination was sent
14:54:47 11 from Gibraltar to NSS?

14:54:49 12 A. I'm taking your word for it. I don't have either of those
14:54:53 13 documents in front of me. The last one you had me looking at
14:54:56 14 was a cert letter. I don't dispute that. I just don't have
14:55:00 15 them in front of me.

14:55:01 16 Q. Does that refresh your memory?

14:55:05 17 A. That is February 4th, 2013.

14:55:07 18 Q. 2015?

14:55:09 19 A. I'm sorry. '15. It's blurry on this computer screen.

14:55:13 20 Q. So the next exhibit, let's look -- moving forward in time.
14:55:20 21 Defendant's Exhibit 29, a couple of weeks later. Now we're on
14:55:28 22 February 23rd, 2015. This is after you sent the notice of
14:55:33 23 termination and actually got this signed agreement back on the
14:55:38 24 termination notice from NSS. And this e-mail here, it's
14:55:54 25 Betafence, Ramon, Ramon Tico, an e-mail to Jim Bryer at your

14:55:58 1 office, copying you, and referring to items that came out of a
14:56:02 2 conference call we had over the weekend, including vertical
14:56:05 3 lift barrier taken out of the deal.

14:56:07 4 That was your -- he's referring to your weekend
14:56:10 5 telephone conference, correct?

14:56:12 6 A. Yes, sir.

14:56:13 7 Q. And, finally, in this list, Defendants' Exhibit 30, are
14:56:27 8 you there?

14:56:30 9 A. I'm sorry?

14:56:33 10 Q. You got it?

14:56:34 11 A. What exhibit are you in now?

14:56:35 12 Q. Defendant's Exhibit 30. You've got it in your notebook in
14:56:38 13 front of you and you can see it on your screen.

14:56:41 14 A. I just didn't hear the 30.

14:56:43 15 Q. The highlighted particular portions, this is Jim Bryer at
14:56:46 16 your office sending an e-mail on March 5th, 2015 to
14:56:50 17 Charlotte Callens at Betafence, copying you, and stating that
14:56:53 18 "The vertical lift barriers from the letter of intent should be
14:56:56 19 removed from the sale document per Bill's discussion with
14:57:02 20 Ramon."

14:57:02 21 So you remember that? You had a conversation then
14:57:04 22 with Ramon at Betafence and you-all agreed to remove the
14:57:08 23 vertical lift barriers, correct?

14:57:10 24 A. Yes, sir.

14:57:10 25 Q. So let's look at Defendants' Exhibit 16. This is the

14:57:31 1 final signed version of the Betafence agreement.

14:57:33 2 A. Sorry. Exhibit what?

14:57:37 3 Q. Sixteen. Let me know when you're there.

14:58:00 4 A. I'm sorry. Is there a question on the table?

14:58:02 5 Q. Yes. Let me know when you're there, when you're at the
14:58:05 6 exhibit.

14:58:05 7 A. Okay. I'm here.

14:58:06 8 Q. Okay. Let me ask you to turn to page 1 in this document.

14:58:15 9 It's actually the third page in. And this is where we see how
14:58:28 10 the vertical lift barriers were removed.

14:58:30 11 You've got this definition of the seller's business.

14:58:34 12 This harkens back to the letter of intent and the way it was
14:58:36 13 defined. And this time the seller's business is defined to
14:58:40 14 relate to cable-based anti-ram crash fence products, just like
14:58:43 15 before, including cable-based gates. But it takes out vertical
14:58:47 16 lift barriers, correct?

14:58:49 17 A. Are you asking if it specifically addresses vertical lift
14:58:56 18 barriers?

14:58:56 19 Q. I'm asking you to confirm that vertical lift barriers was
14:59:00 20 removed from this agreement, and this was one of the ways it
14:59:03 21 was removed. It was taken out of the definition of the
14:59:05 22 seller's business?

14:59:05 23 A. It was definitely removed from this agreement. I can
14:59:09 24 testify to that. And it's not in that paragraph. Correct.

14:59:15 25 Q. And then the other way it was removed is in the list of

14:59:22 1 products. Just like that e-mail that we saw before, the
14:59:28 2 15 products now is turned into 14.

14:59:31 3 A. Can you tell me what page you're looking at?

14:59:35 4 Q. It doesn't have a page number on it. It's schedule C

14:59:37 5 products. But the fastest way to get there is to look at the

14:59:40 6 Bates numbers in the lower right-hand corner and look for Bates

14:59:44 7 Number 12422.

15:00:02 8 A. I'm there.

15:00:03 9 Q. So during this same time period that you were working with

15:00:09 10 Betafence to remove the vertical lift barriers from the sale,

15:00:13 11 you sent the termination notice to NSS on February 4th, 2015,

15:00:17 12 correct?

15:00:17 13 A. Correct.

15:00:18 14 Q. And you attached that termination notice as an exhibit to

15:00:21 15 the sales agreement. Do you remember that? I'll show it to

15:00:29 16 you. If you can move forward to --

15:00:30 17 A. I would assume so.

15:00:32 18 Q. -- Bates Number 12426.

15:00:34 19 THE COURT: One of you talk at a time. Don't
15:00:36 20 interrupt him. And, Mr. Rogers, don't you interrupt him.

15:00:39 21 MR. ROGERS: Yes, sir.

15:00:43 22 THE COURT: Now, restate your question because I
15:00:44 23 didn't get it.

15:00:45 24 Q. (BY MR. ROGERS) Okay. You attached the termination notice
15:00:50 25 as an exhibit to the sales agreement at schedule 3.12.1,

15:00:56 1 correct?

15:00:57 2 A. Yes. I'm not seeing that because you didn't tell me where

15:01:00 3 to go, but I agree.

15:01:02 4 Q. Okay.

15:01:02 5 A. There it is on the screen.

15:01:04 6 Q. If you want to see it in front of you --

15:01:06 7 A. No. That's fine.

15:01:07 8 Q. -- it's 12426.

15:01:11 9 And you've not only attached this as an exhibit, you

15:01:14 10 referenced it in the agreement itself. Let's take a look at

15:01:21 11 that and you can look at page 12401. Let me know when you're

15:01:39 12 there.

15:01:39 13 A. I see it.

15:01:40 14 Q. So you've referenced this termination -- this NSS

15:01:46 15 termination in the Betafence agreement. Then you assigned it.

15:01:54 16 A. I didn't hear the last.

15:01:55 17 Q. You assigned -- you assigned this contractual agreement --

15:01:59 18 Gibraltar assigned this contractual agreement to Betafence.

15:02:04 19 Let me ask it a different way. I'm going to read the language

15:02:09 20 from section 3.12.4, and you tell me whether I read it

15:02:13 21 correctly. It's from the last line of page 15, Bates Numbers

15:02:19 22 Gibraltar 12401 and it goes to 12402 across the page.

15:02:28 23 And this says, "NSS has willingly assented to the NSS

15:02:33 24 termination notice and thereby expressly waived all claims to

15:02:39 25 right in the products, the benefit of which waiver shall accrue

15:02:44 1 to the buyer" -- that's Betafence -- "at the agreement date" --
15:02:50 2 that's March of 2015 -- "and which rights to enforce shall be
15:02:54 3 the responsibility of the buyer after the agreement date."

15:02:57 4 Did I read that correctly?

15:03:01 5 A. Are you -- you're in paragraph 3.12.2?

15:03:06 6 Q. 3.12.4.

15:03:09 7 A. Okay. Yes. This says, "NSS or other persons has not
15:03:22 8 challenged the valid lawful termination of the past NSS
15:03:25 9 arrangement and has not threatened to do so. Specifically, NSS
15:03:30 10 has willingly assented to the NSS termination notice and
15:03:36 11 thereby expressly waived all claims to rights in the products,
15:03:42 12 the benefit of which waiver shall accrue to the buyer at the
15:03:48 13 agreement date and which rights to enforce shall be responsible
15:03:51 14 of the buyer after the agreement date."

15:03:54 15 Q. And I'll agree that you read that correctly.

15:04:03 16 Now, it makes sense that Gibraltar would assign all
15:04:06 17 of its rights to enforce the termination notice agreement to
15:04:08 18 Betafence because the only products that were contemplated by
15:04:16 19 NSS's waiver of rights in that agreement was to sell products
15:04:19 20 that was the Gibraltar cable-based products sold to Betafence,
15:04:22 21 correct?

15:04:23 22 A. You're going to have to ask that question again.

15:04:31 23 Q. It makes sense, doesn't it, that Gibraltar would assign
15:04:35 24 all of its rights to enforce the termination notice to
15:04:37 25 Betafence because the only products that were contemplated by

15:04:40 1 NSS's waiver of rights to sell products was the Gibraltar
15:04:44 2 cable-based products sold to Betafence?

15:04:48 3 A. I would have to get my attorneys to analyze a whole
15:04:52 4 contract to come to a legal conclusion. The intent was it was
15:04:56 5 just related to the products that Beta was purchasing on their
15:05:03 6 side. The termination agreement applies to us on the products
15:05:07 7 that I retained and applies to Beta on the products they
15:05:11 8 retained. It terminated his agreement to any rights to
15:05:14 9 Gibraltar products. Beta's interest obviously is only in the
15:05:18 10 products they're purchasing.

15:05:20 11 Q. Isn't it true that you -- you told your son Stephen Neusch
15:05:24 12 before he signed the termination notice for NSS that you were
15:05:29 13 removing the vertical lift barriers from the Betafence sale,
15:05:32 14 and the sole purpose of you asking him to sign the termination
15:05:36 15 notice was so that you could assure Betafence that NSS would
15:05:41 16 not continue to make and sell the Gibraltar cable-based
15:05:44 17 products that were being sold to Betafence?

15:05:48 18 A. There was zero connection between the vertical lift
15:05:51 19 barrier and Stephen signing the termination. In fact, I think
15:05:55 20 that was all done after, if I'm not mistaken, the termination
15:06:00 21 agreement was signed. I don't have the dates, but -- but there
15:06:05 22 wasn't a connection between those two at all.

15:06:13 23 Q. Well, how about at least one of the connections being the
15:06:16 24 date, February 4th, 2015, the same day that you sent a
15:06:25 25 termination notice to NSS? That same day you're asking for --

15:06:35 1 for Betafence to set aside some time to talk about NSS and the
15:06:40 2 vertical lift barriers.

15:06:41 3 A. Uh-huh. But he signed and terminated without any
15:06:44 4 guarantee that Beta would agree to that. I told Stephen I
15:06:49 5 would ask. So based on those dates, my assumption -- I don't
15:06:54 6 remember the details -- was we had that conversation all at
15:06:58 7 the -- you know, at the same time. But there was no guarantee.
15:07:02 8 I said I'll ask Beta. If I can get it back, I'll try. I said,
15:07:07 9 You saw the correspondence I sent them trying to make the case
15:07:10 10 that we'd like the vertical lift back. But the vertical lift
15:07:15 11 had nothing to do with him signing the termination agreement,
15:07:18 12 if you're trying to connect those two, because there wasn't.

15:07:21 13 Q. Oh, I'm connecting them. It's just a coincidence it was
15:07:25 14 the same date?

15:07:26 15 A. He terminated on February 14th. He agreed and signed it.
15:07:34 16 We obviously discussed the termination agreement. Jim Bryer
15:07:40 17 drafted it. We also discussed that he'd like to keep selling
15:07:46 18 the vertical lift barrier. So he wants me to make that so he
15:07:52 19 can buy it from me and not have to deal with Beta. So I got it
15:07:56 20 back from Beta. That process started on that date, but they
15:08:01 21 didn't agree to it until later. You have the documents showing
15:08:05 22 that. So it wasn't tied. There was no tying.

15:08:09 23 If you're implying that the only reason he signed the
15:08:12 24 termination agreement was so he could have the vertical lift,
15:08:17 25 there's no connection whatsoever.

15:08:20 1 Q. Isn't it true that before Stephen Neusch -- your son
15:08:25 2 Stephen Neusch signed the termination notice agreement on
15:08:28 3 behalf of NSS, you told him that Gibraltar had removed the
15:08:36 4 vertical lift barriers from the Betafence sale and that his
15:08:39 5 signing of the termination notice would not interfere with his
15:08:43 6 continued sales of the vertical lift barrier that was his idea
15:08:47 7 and design?

15:08:48 8 A. Absolutely not. If you look, the dates of me asking are
15:08:56 9 after he signed the termination, and there was no guarantee
15:08:59 10 they'd do it. I told him I would ask. That's all I could do.
15:09:02 11 I told him I'm not going to jeopardize my deal with Beta and
15:09:06 12 I'm not going to give them consideration for it. And they
15:09:09 13 agreed to do it with no consideration. They took it out. But
15:09:12 14 there was no guarantee that they would even agree to it. And
15:09:15 15 that didn't happen until after that. And your whole
15:09:18 16 conversation that you portrayed did not happen, not even in
15:09:23 17 theory or principle or in general.

15:09:26 18 Q. Let me ask you to continue looking at Defendants'
15:09:33 19 Exhibit 16, and take a look at --

15:09:36 20 A. Did you say one-five?

15:09:38 21 Q. Sixteen. One-six.

15:09:39 22 A. Okay.

15:09:40 23 Q. And I'll direct you. Since it's internal in the document,
15:09:44 24 look at the Bates number pages again, 12423.

15:09:51 25 A. I'm sorry twelve-thousand what?

15:09:53 1 Q. 12423.

15:10:03 2 A. I apologize for having such a hard time hearing. I

15:10:10 3 literally am hard of hearing. A doctor can verify.

15:10:16 4 Q. I'm trying to speak into the microphone, but I stray away

15:10:19 5 every once in a while. So I understand completely.

15:10:24 6 A. I lost track. Say what the page number is.

15:10:26 7 Q. 12423 -- it's schedule 2.2.1, the transfer of patent

15:10:34 8 assets.

15:10:35 9 A. I have it.

15:10:36 10 Q. All right. In the Betafence sale agreement, the

15:10:43 11 transferred assets -- the transferred patent assets are one

15:10:47 12 patent in two applications, correct?

15:10:51 13 A. Correct.

15:10:51 14 Q. And you testified earlier that all four of these products

15:11:11 15 are covered by patents, correct?

15:11:13 16 A. Correct. Well, patent pendings. There are some that have

15:11:22 17 already been granted. We have a patent on the fence. On the

15:11:25 18 cable restraint barrier, there's some that they've accepted,

15:11:28 19 but it's still pending. And then the wedge is pending.

15:11:32 20 Q. The wedge -- the wedge patent application, we'll talk

15:11:39 21 about that in a minute, that's pending. And that's still owned

15:11:42 22 by Gibraltar, correct?

15:11:43 23 A. Correct.

15:11:44 24 Q. It's Neusch Innovations LP, correct?

15:11:48 25 A. Neusch Innovations.

15:11:50 1 Q. Neusch Innovations, LP. That's one of the Gibraltar
15:11:53 2 family of companies. That's the company that owns the IP.
15:11:56 3 That's the company that owns the finger wedge barrier patent
15:11:59 4 application, correct?
15:12:02 5 A. Correct.
15:12:02 6 Q. Okay. But the application for the patent is just an
15:12:13 7 application. The application that you say covers the vertical
15:12:17 8 lift barriers, you sold that, right? You sold it to Betafence?
15:12:22 9 It's right here.
15:12:25 10 A. Yes. The patent was -- went along with all that they
15:12:30 11 bought. So when you say I sold it, we -- it's a continuation
15:12:34 12 of the -- of the patent on the fence. They got the fence, so
15:12:39 13 we had to give them the continuing patent. So they got the
15:12:42 14 patents. It's very clear. You just discussed where it was
15:12:46 15 taken out. I still have the rights to the vertical lift
15:12:51 16 barrier.
15:12:52 17 Q. But you don't have any patent that covers the vertical
15:12:56 18 lift barrier, correct?
15:12:58 19 A. Okay. I guess it's a technicality, yes. Beta owns that
15:13:07 20 patent application.
15:13:09 21 Q. The patents and patent applications sold to Betafence are
15:13:25 22 one patent listed in the top row -- well, the top rows are
15:13:32 23 headings. The first row listing patents are patent
15:13:36 24 applications. That's a patent, correct? And the next two are
15:13:40 25 patent applications?

15:13:42 1 A. Correct.

15:13:42 2 Q. We can refer to them -- you've got the '433 patent and the
15:13:49 3 '457 application and the '916 application. You understand
15:13:55 4 that?

15:13:55 5 A. Correct.

15:13:55 6 Q. And here's what you refer to them as in the Betafence
15:14:00 7 agreement. The '457 application is for a sliding gate, and the
15:14:04 8 '916 application, it says pop-up gate. That's the vertical
15:14:10 9 lift barrier, correct?

15:14:12 10 A. Correct.

15:14:13 11 Q. And what does that say there? What does that mean where
15:14:17 12 it says specification includes pop-up gate? What's that
15:14:21 13 referring to?

15:14:22 14 A. Pop-up, vertical lift, cable restraint barrier are all
15:14:27 15 three terms of the same product. It's just a different way of
15:14:30 16 describing it.

15:14:31 17 Q. Okay. What I'm distinguishing -- and I understand that.
15:14:35 18 I agree. Pop-up gate, vertical lift, restraint barrier, same
15:14:38 19 thing. We're talking about the first two disputed products
15:14:41 20 that I wanted to talk to you about.

15:14:43 21 Is this a signal -- is this a signal to Betafence
15:14:50 22 that even though we Gibraltar took the vertical lift barriers
15:14:55 23 out of the agreement, that you've still got a patent
15:14:59 24 application to Betafence that you can go after and get
15:15:02 25 exclusive rights to vertical lift barriers?

15:15:06 1 A. I don't understand the question. Can you repeat it?

15:15:08 2 Q. What's the purpose of this statement where it says
15:15:11 3 "specification includes pop-up gate" when Gibraltar --

15:15:14 4 A. I believe what it means --

15:15:15 5 Q. Well, hold on.

15:15:17 6 -- when Gibraltar sells the '916 application to
15:15:21 7 Betafence, what is the purpose of telling them that the
15:15:24 8 specification includes pop-up gate?

15:15:27 9 A. I believe what it means -- and that patent application is
15:15:31 10 a continuation of our existing patent that's already been
15:15:35 11 issued '433, the top one. So when -- this is a new version of
15:15:42 12 that patent and a vertical lift barrier pop-up, but you want
15:15:46 13 them to be as broad as possible to cover as many possible
15:15:49 14 scenarios or products. So I'm assuming the word includes, you
15:15:57 15 know, identifying the pop-up as a part of that patent
15:16:01 16 application. And, again, that's a part of the continuation of
15:16:05 17 the patent that's already been issued, the '433.

15:16:12 18 Q. Let's take a look at Defendants' Exhibit 14, the '916
15:16:18 19 patent application.

15:16:36 20 A. I'm there.

15:16:37 21 Q. Did you tell Betafence at any time that you made multiple
15:16:44 22 attempts -- multiple attempts in this '916 application to try
15:16:49 23 to get claims issued on the vertical lift barrier that had been
15:16:53 24 repeatedly rejected to the point that you had given up and
15:16:56 25 withdrew all of the claims directed to a vertical lift barrier?

15:16:59 1 A. Once I design a product, I talk to my patent attorney and
15:17:03 2 tell them all the unique features. From that point on I'm not
15:17:09 3 involved. If there is any correspondence, it goes to
15:17:14 4 Jim Bryer. He's our in-house counsel. So I'm not aware of --
15:17:19 5 what you just proclaimed, I'm not aware of. I didn't know of
15:17:26 6 any that were rejected or accepted. I've been told that some
15:17:30 7 of the items in this patent have been accepted. It's still
15:17:33 8 pending. That's what I've been told. I couldn't even tell you
15:17:36 9 what the specifics are.

15:17:38 10 Q. Well, let's take a look at the application. Take a look
15:17:42 11 at figure 10. I've got it up on the screen. You've got it in
15:17:46 12 front of you. That's the --

15:17:49 13 A. This has zero value, though, to Beta. So I don't, you
15:17:55 14 know ...

15:17:56 15 Q. Zero value to Beta?

15:18:00 16 A. This patent application.

15:18:01 17 Q. Okay. I don't disagree with that. Let's take a look at
15:18:06 18 figure 10. That's the -- that's the sliding gate, right? The
15:18:10 19 arrows show it. You've got two choices on this gate, right?
15:18:14 20 You can slide it, or you can vertically lower and raise it,
15:18:19 21 correct?

15:18:22 22 THE COURT: What is --

15:18:24 23 THE WITNESS: Figure 10 is not a sliding gate.

15:18:26 24 THE COURT: Pardon me. What exhibit are you
15:18:28 25 referring to?

15:18:30 1 MR. ROGERS: This is Defendants' Exhibit 14, which is
15:18:33 2 the '916 application that's referred to as having -- in the
15:18:37 3 Betafence agreement as having specification, including a pop-up
15:18:46 4 gate.

15:18:47 5 Q. Figure 10, do you have it in front of you, Mr. Neusch?

15:18:50 6 A. Yes. I apologize. I misspoke. This is the sliding gate.

15:18:54 7 Q. Okay. And then go to figure 15.

15:19:09 8 A. This is the vertical lift barrier.

15:19:10 9 Q. There it is. That's the vertical lift barrier. And take
15:19:21 10 a look at page 4 in the specification, in particular, the
15:19:25 11 highlighted portions I've got.

15:19:28 12 A. Can you tell me where I can find that page?

15:19:30 13 Q. The Bates number, if you look at lower right-hand corner,
15:19:34 14 is 12445. But the page 4 is at the top center of the page.

15:19:44 15 And the way to look at things in these applications --

15:19:47 16 A. I'm there.

15:19:48 17 Q. -- is by paragraph number.

15:19:50 18 And so what I have highlighted here is just the
15:19:55 19 references to the vertical lift. It's got it all over the
15:19:57 20 place, "vertical lift," "vertical lift." And then paragraph 56
15:20:03 21 it describes it. But what I really want to show you is the
15:20:09 22 claims. And it's on the last -- the second to the last page of
15:20:15 23 the document. You've got claims in there. There's 8, 10, 12
15:20:22 24 and 17 that are claiming the vertical lift barrier.

15:20:28 25 A. Okay.

15:20:29 1 Q. My next question is going to be related to the fact that
15:20:51 2 these claims are all withdrawn. But I understand you're not
15:20:54 3 involved in the process, so you wouldn't know?

15:20:56 4 A. On all our patents I'm not involved in the process. Once
15:21:01 5 I turn it over to my patent attorney, I'm no longer involved.
15:21:05 6 I own over a dozen patents of different products. Once I give
15:21:13 7 it to the attorney, I don't get involved in the specific
15:21:15 8 claims, which one is rejected or not. So I couldn't tell you.

15:21:22 9 Q. Well, you can see here that the filing date is
15:21:24 10 August 16th, 2010. I'm pointing to the front page of the
15:21:29 11 '961 [sic] application, Defendants' Exhibit 14. And it was
15:21:33 12 published on March 17th, 2011. So you know at this time of the
15:21:38 13 publication your patent attorney was attempting to get claims
15:21:42 14 issued on the vertical lift barrier.

15:21:46 15 So my question is: At any time between the August
15:21:49 16 16th filing of this '961 [sic] application when you filed those
15:21:54 17 claims seeking to get patent coverage on the vertical lift
15:21:59 18 barrier and eventually up to the time when I'll assure you
15:22:03 19 they've all been withdrawn -- all of these claims have been
15:22:07 20 withdrawn after being rejected -- at any time did you ever tell
15:22:11 21 the patent office that the vertical lift barrier was your son
15:22:13 22 Stephen Neusch's idea and design.

15:22:16 23 A. I never talked to the patent office.

15:22:20 24 Q. Did you ever tell Betafence that the vertical lift barrier
15:22:24 25 was your son Stephen Neusch's idea and design?

15:22:27 1 A. I've never told anybody that it's Stephen Neusch's because
15:22:30 2 it's not.

15:22:31 3 Q. Did you tell Betafence that the vertical lift barrier was
15:22:34 4 being removed from the sale from Gibraltar to Betafence because
15:22:37 5 it was your son Stephen Neusch's idea and design?

15:22:42 6 A. I did not.

15:22:51 7 Let me -- I want to make sure I'm accurate there. I
15:22:53 8 just realized you said, because it was his idea. I may have
15:22:57 9 used those words --

15:22:58 10 Q. I don't have a pending question.

15:23:00 11 THE COURT: I'm going to let him finish.

15:23:04 12 Q. (BY MR. ROGERS) Okay. Go ahead.

15:23:05 13 A. I just want to be accurate. Your last statement I said I
15:23:10 14 did not. I've said all along Stephen came to me with the idea
15:23:13 15 of the vertical lift. I may have related that to Beta. I did
15:23:17 16 not in any way imply that Stephen had any right to the vertical
15:23:21 17 lift barrier.

15:23:27 18 Q. So you took the vertical lift barrier out of the sale to
15:23:31 19 Betafence for Gibraltar, not for NSS?

15:23:38 20 A. We've discussed this. Because he came to me, we had a
15:23:41 21 discussion, I said I'll try. I was successful. Never was it
15:23:48 22 discussed that he owned it or had rights to it. The plan going
15:23:53 23 forward would be, if he sold one, I would manufacture it for
15:23:57 24 him.

15:24:10 25 Q. Did you tell him that if he signed that notice of

15:24:14 1 termination, that that gave you -- your family of companies the
15:24:21 2 right to get an injunction against him from selling this
15:24:25 3 vertical lift barrier?

15:24:26 4 A. I never dreamed in my wildest expectations that he would
15:24:29 5 claim rights to any of my products.

15:24:32 6 Q. So I want to shift now and talk about the finger wedge
15:25:04 7 barrier. All right?

15:25:05 8 THE COURT: Well, I think before we shift, this is as
15:25:07 9 good a breaking point for the afternoon recess as any. We'll
15:25:10 10 be in recess for 15 minutes.

15:25:12 11 (Recess)

15:42:01 12 (Open Court)

15:42:01 13 THE COURT: Mr. Rogers, you may continue.

15:42:04 14 MR. TAYLOR: Judge are we still planning on arguing
15:42:06 15 this today, because that was my --

15:42:08 16 THE COURT: You know, there was a time when we were
15:42:10 17 planning on two hours to the side.

15:42:15 18 MR. TAYLOR: Yes.

15:42:15 19 THE COURT: No. We are not going to argue it today.
15:42:17 20 I want to get all of the evidence in this record as quickly as
15:42:20 21 we can. Then we will talk about when we're going to argue it.
15:42:26 22 But I want adequate time for you-all to argue the case, and
15:42:32 23 we're not going to have it unless we terminate the evidence
15:42:35 24 right now. So I would like to get the rest of the evidence
15:42:39 25 done, and then we'll talk about how much time you need to argue

15:42:42 1 it and then we'll schedule argument. You may proceed.

15:42:51 2 Q. (BY MR. ROGERS) Good afternoon, Mr. Neusch.

15:42:51 3 A. Good afternoon.

15:42:52 4 Q. I want to shift and talk about -- we're shifting away from
15:42:56 5 the vertical lift barriers and now moving to the finger wedge
15:43:00 6 barrier. And I'm going to have you take a look at Defendants'
15:43:03 7 Exhibit 167, which is the finger wedge patent application you
15:43:09 8 referred to before.

15:43:14 9 Oh, but first -- I'm sorry. Let me ask you first to
15:43:16 10 turn to Defendants' Exhibit 25, the same one we looked at
15:43:22 11 before, your letter. Let me know when you're there.

15:43:32 12 A. I'm here.

15:43:32 13 Q. So in your letter to your son Stephen Neusch, we've
15:43:36 14 already talked about your reference to the vertical lift
15:43:43 15 barrier as his idea and design. But in the next sentence you
15:43:46 16 address the finger wedge barrier and you say -- you're talking
15:43:50 17 to Stephen -- "Yes, you had good ideas on the wedge, but I
15:43:55 18 didn't use your detailed drawings even though it bothered you."
15:44:00 19 And then you even ask, "What do you think I owe you for the
15:44:04 20 wedge?" Is that correct?

15:44:06 21 A. Correct. On both those he owes me over \$10 million. So
15:44:13 22 if he felt like he had some value, okay, what is it? Like a
15:44:18 23 100,000? 200,000? I'll write it off the 10 million you owe me
15:44:22 24 and we can put this to bed. It was just a way of trying to a
15:44:33 25 move forward.

15:44:33 1 Q. What are the drawings you're referring to as the detailed
15:44:41 2 drawings that you didn't use?

15:44:43 3 A. Yes. Stephen did drawings of a finger wedge, and then I
15:44:49 4 took those drawings and did not use them. I gave those
15:44:54 5 drawings to my patent attorney. He said that none of our
15:44:58 6 patents have -- anything in his drawings have nothing to do
15:45:04 7 with our patent claims. But I didn't use his drawings. Mine's
15:45:09 8 very different than his.

15:45:10 9 Q. But you gave them to your patent attorney to use?

15:45:13 10 A. After this -- I don't know when it was. Within the last.

15:45:20 11 THE COURT: Stop. Stop. I didn't hear you.

15:45:23 12 MR. CONNOR: I'm going to object. This question is
15:45:24 13 calling for a disclosure of attorney-client communication
15:45:28 14 between Mr. Neusch and his patent attorney. I would like to
15:45:31 15 caution the witness in that regard, Your Honor.

15:45:33 16 THE COURT: All right. Caution the witness. Have
15:45:36 17 you already cautioned him, or do you want to caution him?

15:45:39 18 MR. CONNOR: I think the message got across,
15:45:41 19 Your Honor.

15:45:42 20 MR. ROGERS: I'm not asking for any communications.

15:45:45 21 THE COURT: Go ahead.

15:45:45 22 Q. (BY MR. ROGERS) My question is: Did you give those
15:45:46 23 drawings -- you did. You gave those drawings, Stephen
15:45:50 24 Neusch's -- your son Stephen Neusch's detailed drawings on his
15:45:54 25 good ideas -- is that what you said? -- good ideas on the

15:45:58 1 finger wedge. You gave that to your patent attorney?

15:46:03 2 A. To -- because of this dispute, and I wanted to make sure

15:46:07 3 that we didn't use any of his ideas in what we filed for a

15:46:13 4 patent. He assured us that none of Stephen's drawings violate

15:46:18 5 my patent. I'm sorry. I didn't listen to you.

15:46:36 6 Q. So now let me ask you to turn to Defendants' Exhibit 17,

15:46:43 7 and we'll refer to this as the '678 application. It's what

15:46:48 8 you've referred to, I believe, as the finger wedge patent

15:46:50 9 application; is that correct?

15:47:00 10 A. I am there now, so what's the question? Excuse me.

15:47:03 11 Q. This is your application for the finger wedge patent,

15:47:12 12 correct?

15:47:13 13 A. Yes, sir.

15:47:13 14 Q. I want you to look in the patent -- I want you to look at

15:47:52 15 a few specific areas. The first one I want you to look at is

15:47:55 16 page 2. If you're going by Bates numbers, it's

15:47:58 17 Gibraltar 12382. There's a number 2 at the top, so it's

15:48:04 18 page 2 --

15:48:05 19 A. I'm there.

15:48:06 20 Q. -- of the application publication.

15:48:08 21 And look at the part that I've got with the arrow

15:48:11 22 drawn.

15:48:20 23 A. Yes.

15:48:20 24 Q. That's referring to element three. It's called a support

15:48:23 25 member or a finger member. Couple of different places you can

15:48:42 1 see in the drawing from the side view, figure 4, item 30.

15:48:50 2 A. Yes.

15:48:50 3 Q. Now, you say you didn't use Stephen's ideas when you filed
15:48:54 4 this patent application, correct?

15:48:58 5 A. I said that none of his ideas we filed for a patent on.

15:49:03 6 We did have some ideas. I've testified -- not today, but I
15:49:06 7 testified earlier I used some of those ideas. It's nothing
15:49:10 8 related to what we filed for a patent.

15:49:12 9 Q. Okay. So let's look at the ideas -- Stephen's ideas that
15:49:15 10 you filed for a patent application on?

15:49:17 11 A. I just said I did not use Stephen's ideas to file a patent
15:49:22 12 on.

15:49:23 13 Q. Okay. Let's look at some areas where your son
15:49:27 14 Stephen Neusch asserts that you filed a patent application on.
15:49:30 15 And, in particular, paragraph 21.

15:49:35 16 A. Okay.

15:49:36 17 Q. What I'm pointing to here where you specifically say that
15:49:40 18 the finger members, the fingers in the finger wedge barrier,
15:49:44 19 are I-beam structures. That's an idea that your son
15:49:49 20 Stephen Neusch gave to you, correct?

15:49:51 21 A. Correct. The use of the I-beam -- it's actually a W-beam,
15:49:59 22 but I know what he means. But the use of that was Stephen's
15:50:04 23 idea. That's a structural member.

15:50:07 24 Q. There's a difference between a W-beam and an I-beam, isn't
15:50:12 25 there?

15:50:12 1 A. It's the same shape. The W stands for wide, so the top of
15:50:20 2 the "I" is wider, but it's basically the same shape. Some
15:50:22 3 people call it an H-beam.

15:50:23 4 Q. But the significance of it is the distinction between an
15:50:28 5 I-beam or W-beam, whatever you want to call it, and what was
15:50:31 6 prior. Tubes were used prior, correct?

15:50:34 7 A. I'd never done a wedge barrier prior to this.

15:50:37 8 Q. Precisely. And Stephen Neusch provided to you the
15:50:45 9 significant -- the idea -- the significant benefit of using the
15:50:49 10 I-beams because of their benefits and the strength-to-weight
15:50:53 11 ratio. Do you remember that?

15:50:54 12 A. I do remember that.

15:50:55 13 Q. And then --

15:50:56 14 A. And I do remember that suggestion. I don't ...

15:51:01 15 Q. And then you put that into your patent application where
15:51:05 16 you're named as the sole inventor on the application, correct?

15:51:09 17 A. I haven't read this application, but I'd be shocked if
15:51:12 18 he's filing for a patent on using an I-beam.

15:51:18 19 Q. The front page of this patent has you listed as the only
15:51:23 20 inventor, correct?

15:51:23 21 A. That is correct.

15:51:24 22 Q. Your son's nowhere in this patent application, is he?

15:51:28 23 A. That is correct.

15:51:29 24 Q. This is all your invention in here, right? That's what
15:51:33 25 you told the patent office?

15:51:34 1 A. That is correct.

15:51:35 2 Q. Same page, page 2, Bates Number 12382, the part where I
15:51:57 3 have -- the part where I have as asterisk. Let's talk about
15:52:09 4 element 44. That's compartment 44. That's where the drive
15:52:13 5 mechanism is located. Your patent application with you named
15:52:17 6 as the sole inventor talks about how important the location of
15:52:20 7 that is, the location being on the asset side of the barrier.

15:52:25 8 Can you tell the Court the difference between the
15:52:27 9 asset side and the threat side of the wedge barrier and the
15:52:33 10 distinction?

15:52:33 11 A. Uh-huh. The threat side would be the side that the
15:52:37 12 vehicle is coming from. The asset side is the side that you're
15:52:41 13 trying to protect.

15:52:42 14 Q. And so in your patent application with you listed as the
15:52:47 15 sole inventor, in this paragraph 23, it talks about the
15:52:53 16 location of the drive mechanism 36 provides protection to the
15:52:58 17 mechanism, for example, from explosives when the wedge barrier
15:53:04 18 is in the deployed position. It's critical under your patent
15:53:10 19 application and what you're claiming here is your invention --

15:53:14 20 A. Correct.

15:53:14 21 Q. -- to put this compartment that has the components in it
15:53:18 22 on the asset side of the barrier.

15:53:21 23 That's Stephen Neusch's idea that he gave to you,
15:53:24 24 isn't it?

15:53:25 25 A. I do not recall that he gave me that. I believe -- well,

15:53:34 1 I know that that was discussed post-invention, post-having a
15:53:40 2 wedge barrier, as a very valuable element. I don't recall
15:53:48 3 Stephen originating that idea. You know, if he can show me
15:53:55 4 some paperwork or something, I just don't recall. I very
15:54:00 5 specifically remember one of the reasons I put it in the back
15:54:05 6 was so I had room for it because there wasn't room in the
15:54:08 7 fingers.

15:54:13 8 And then we also put -- which was Stephen's idea, we
15:54:17 9 put concrete between the fingers. That was Stephen's idea.
15:54:21 10 That's what I recall. But because of that, because of the
15:54:25 11 concrete, the only room we had in front of the -- on the attack
15:54:31 12 side was just in the fingers themselves and there wasn't room
15:54:34 13 to put actuation. I'm going by memory. This was six years,
15:54:39 14 seven years ago. But I believe it was actually my idea that
15:54:44 15 put it in the back because I had to run to actuate it. Later
15:54:48 16 we saw that as a -- as a plus -- you know, as in lots of
15:54:53 17 inventions you realize, hey, there's actually other benefits to
15:54:56 18 this product -- being that now, once it's in the open position,
15:55:02 19 it wasn't vulnerable to attack.

15:55:05 20 I know that was discussed. I know that was part of
15:55:07 21 Stephen's sales when he sold the barrier in the marketplace. I
15:55:11 22 honestly don't think that was his idea during the design. I
15:55:16 23 believe that was me trying to find a place to actually fit the
15:55:19 24 actuation. It had nothing -- that element at the time I was
15:55:24 25 looking at it, you know, it was -- it was benefit that we

15:55:28 1 created. But I believe the reality was, if you look at the
15:55:35 2 actuator, there is no way you can get it underneath the wedge.
15:55:38 3 It's a 12-inch foundation. It's a shallow foundation.

15:55:43 4 The I-beams that you refer to and the six-by-six
15:55:47 5 tubing across the top is six inches deep, so that leaves a
15:55:51 6 six-inch-by-six-inch space that's actually used in the cables.
15:55:55 7 There is no place to put the actuation.

15:55:58 8 Q. And so since it was your idea instead of your son
15:56:03 9 Stephen's, that why you put it in your patent application with
15:56:06 10 you listed as the sole named inventor?

15:56:09 11 A. I just said it was my idea to put it back there, I
15:56:12 12 believe.

15:56:12 13 Q. Do you remember testifying something different in your
15:56:14 14 deposition?

15:56:15 15 A. I don't recall that.

15:56:16 16 Q. Well, let me read to you from your deposition, and I'm
15:56:24 17 reading from page 34, lines 8 through 13.

15:56:38 18 MR. ROGERS: Your Honor, this deposition transcript
15:56:40 19 is not in the exhibit list.

15:56:42 20 THE COURT: All right.

15:56:42 21 MR. ROGERS: So I'm passing up a copy.

15:56:46 22 Q. So the question in the deposition starting at line 8:
15:56:51 23 "And did Stephen design the location" --

15:56:52 24 THE COURT: What page?

15:56:54 25 MR. ROGERS: I'm sorry?

15:56:55 1 THE COURT: What page?

15:56:56 2 MR. ROGERS: Page -- page 34, lines 8 through 13.

15:57:11 3 THE COURT: You know, you keep showing me these

15:57:13 4 appendixes that Mr. Reynolds attaches to his report and these

15:57:18 5 depositions that are four to a page, and you're going to have a

15:57:23 6 younger judge try your next case. It's getting harder and

15:57:25 7 harder to read. No. I got it here.

15:57:28 8 MR. ROGERS: I have to wear glasses and use the

15:57:32 9 magnifying glass.

15:57:33 10 THE COURT: I generally have to take mine off to

15:57:35 11 read.

15:57:36 12 MR. ROGERS: It's a struggle because we're trying to

15:57:38 13 save trees, but I understand.

15:57:46 14 Q. "QUESTION: And did Stephen design the location of the

15:57:48 15 motor -- the electric motor?"

15:57:50 16 Your answer: "He may have. When I spoke with the

15:57:53 17 general, that may be. That may have been his idea to put it in

15:57:58 18 that box behind the barrier. Again, we did not file a patent

15:58:02 19 on that."

15:58:04 20 Well, you did file a patent on that.

15:58:07 21 A. Okay.

15:58:07 22 Q. And it was Stephen's idea, wasn't it?

15:58:10 23 A. I don't recall that being -- the box being a part of that

15:58:18 24 patent. But, again, that was -- I turned it over to my patent

15:58:23 25 attorney, so ...

15:58:24 1 Q. Earlier when we were talking about the box, the
15:58:31 2 location -- the important location, as you put in your patent
15:58:35 3 application to have it on the asset side, you started talking
15:58:38 4 about the concrete. You agree that's another one of Stephen's
15:58:44 5 ideas, to put concrete between the fingers. But you didn't
15:58:47 6 patent that, right?

15:58:49 7 A. That was Stephen's idea. I've already proven there might
15:58:54 8 be some things in the patent I'm not aware of. So ...

15:58:57 9 Q. Well, we're going to see it. Stephen talked to you --
15:59:01 10 isn't it true -- isn't it true that when Stephen gave you the
15:59:04 11 idea to put the concrete between the fingers, he talked to you
15:59:08 12 about the significant benefit of it, the purpose of it, to
15:59:11 13 allow for heavier vehicle traffic over the wedge barrier when
15:59:15 14 the wedge barrier is in the down location. Do you recall that?

15:59:20 15 A. I've said from beginning it was Stephen's idea to put
15:59:24 16 concrete in the wedge. He brought me RSSI's finger wedge. In
15:59:31 17 fact, his drawings copied RSSI's finger wedge. Stephen moved
15:59:37 18 the plate back a little bit, but it was very similar to the
15:59:40 19 RSSI. You know, so that was the basis of the -- the idea of
15:59:51 20 the finger wedge was not unique to Stephen. Again, we have a
15:59:54 21 competitor that has a finger wedge. We had their design.
15:59:58 22 Stephen brought that to me. I do remember it was his idea to
16:00:02 23 put concrete, you know, in the wedge, but I don't recall the
16:00:15 24 discussion specifics to its values and points. It was many
16:00:22 25 years ago.

16:00:23 1 Q. Okay. Well, there it is. Take a look at figure 2.

16:00:31 2 That's your concrete in between the finger wedges, correct?

16:00:35 3 A. Correct.

16:00:35 4 Q. Take a look at page 3. It's 12383, page 3 of the patent

16:01:00 5 application, the part I have highlighted. Twelve-inch depth

16:01:07 6 that you put in your patent application, that's another of

16:01:10 7 Stephen Neusch's ideas, isn't it, that he gave to you?

16:01:14 8 A. Okay. Your -- that is a huge general shallow foundation.

16:01:24 9 My shallow foundation bollard is a 12-inch foundation, my post

16:01:30 10 and beam is a 12-inch foundation, my wedge is a 12-inch

16:01:35 11 foundation. That's just a shallow foundation because of

16:01:38 12 utilities.

16:01:40 13 None -- you know, there's others that make shallow

16:01:44 14 foundations. That's not unique to Stephen. That has nothing

16:01:47 15 to do with -- now, we're the first ones to -- with a 12-inch

16:01:55 16 deep only pass. So we may have made a claim to that. But the

16:02:00 17 idea of doing a shallow foundation is not new. It was my

16:02:04 18 technology that actually made it work in that shallow of a

16:02:08 19 foundation. So that was very unique, and very -- nobody has

16:02:14 20 that shallow of a foundation in the industry. I have the

16:02:18 21 shallowest wedge barrier foundation in the industry.

16:02:20 22 Q. And you want to get a patent on that, right? It's so

16:02:24 23 important?

16:02:24 24 A. What?

16:02:24 25 Q. You want to get patent on that, right? It's so important?

16:02:28 1 A. Again, I don't want to get into the actual claims of the
16:02:31 2 patent.

16:02:34 3 Q. All right. So you didn't use Stephen Neusch's detailed
16:02:41 4 drawings, but you've got in your patent application --

16:02:44 5 A. Can I?

16:02:45 6 Q. -- his --

16:02:46 7 A. Finish.

16:02:47 8 Q. -- finger member being made of an I-beam with the benefits
16:02:51 9 of strength-to-weight ratio, correct?

16:02:54 10 A. I'd like to clarify something. I wanted to let you finish
16:03:00 11 talking. I don't think I used the word detailed drawings. He
16:03:03 12 gave me conceptual drawing. There's no details. There's no
16:03:09 13 weld details. There's no fabrication details. He gave me a
16:03:12 14 one-page conceptual drawing.

16:03:14 15 Q. So you didn't use the conceptual drawings that your son
16:03:35 16 Stephen Neusch gave to you, but you did include in your patent
16:03:39 17 application specifically the finger members being shaped as an
16:03:42 18 I-beam for the benefits of strength-to-weight ratio, correct?

16:03:47 19 A. You showed me where it said I-beam. I didn't read what
16:03:52 20 the purpose of that I-beam was in there for.

16:03:55 21 Q. You know what the purpose is, correct? I-beams provide
16:03:58 22 stronger strength-to-weight ratio, which is something --

16:04:00 23 A. Did we claim that in the patent?

16:04:02 24 Q. -- it's very important for a finger wedge to activate
16:04:05 25 quickly to be able to lift it. The less weight, the stronger

16:04:08 1 the strength, the greater benefit. Correct?

16:04:11 2 A. Is that part of the patent claim? Is that what you're

16:04:14 3 asking me?

16:04:15 4 Q. No.

16:04:16 5 A. All right. I'm sorry. Can you repeat the question?

16:04:19 6 Q. You included in your patent application the disclosure of

16:04:22 7 the ideas that Stephen Neusch gave to you to form the finger

16:04:28 8 members of your finger wedge barrier as an I-beam, correct?

16:04:35 9 A. Yes. I've already testified that it was Stephen's idea to

16:04:38 10 use the I-beam.

16:04:39 11 Q. And the concrete between the fingers?

16:04:46 12 A. Yes.

16:04:47 13 Q. And the location?

16:04:49 14 THE COURT: I think I've got the idea.

16:04:52 15 MR. ROGERS: Okay.

16:04:56 16 A. The location of the box I did not agree to.

16:05:02 17 Q. You said it may have been his idea. You just don't

16:05:05 18 remember, right?

16:05:05 19 A. Correct. I told you I can't remember the details. I

16:05:11 20 remember it based on trying to get -- as I explained earlier,

16:05:15 21 it's about fitting the actuator. That's my recollection.

16:05:21 22 Q. Okay. So take a look at the front page of this patent,

16:05:24 23 Defendant's Exhibit 17, the first page. You filed this

16:05:28 24 application on October 28th, 2015, correct?

16:05:31 25 A. Correct.

16:05:34 1 Q. I'm pointing at it to help speed us up. And it's based on
16:05:39 2 a provision filed exactly one year earlier, October 28th, 2014,
16:05:43 3 correct?

16:05:43 4 A. Correct.

16:05:43 5 Q. You know that NSS was selling this finger wedge barrier
16:05:51 6 before that date, correct?

16:05:52 7 A. Before the 2014 date?

16:05:58 8 Q. Even before that. Over a year before October 28th, 2014,
16:06:03 9 you knew that Stephen Neusch or NSS was selling this finger
16:06:08 10 wedge barrier, correct?

16:06:10 11 A. I don't recall when they first offered it to sell.

16:06:14 12 Q. Let's take a look at Defendants' Exhibit 20.

16:07:00 13 A. Okay.

16:07:00 14 Q. Let me know when you're there.

16:07:03 15 A. Okay.

16:07:03 16 Q. When you get to 20, go ahead and flip back to 19. I'll go
16:07:07 17 through that real quick and move on to 20. Let me know when
16:07:09 18 you're to DX-19.

16:07:10 19 A. I apologize. I was looking at this. Can you repeat the
16:07:14 20 question?

16:07:14 21 Q. Yes. Please turn to Defendants' Exhibit 19.

16:07:16 22 A. Nineteen? Okay.

16:07:27 23 Q. Are you familiar with this project, the U.S. Treasury,
16:07:32 24 Birmingham, Alabama, where NSS was selling the finger wedge
16:07:34 25 barrier?

16:07:36 1 A. I know there was a U.S. Treasury in Alabama that we
16:07:42 2 provided wedge barriers on to NSS.

16:07:44 3 Q. You know this was -- this sale was dating back as far as
16:07:47 4 July 16th of 2013?

16:07:50 5 A. This date is January of '14 but. Let me -- I realize I
16:07:57 6 said something wrong. We did not provide the wedges on that
16:08:02 7 project. Stephen had those done by Aaron Ling I believe on
16:08:08 8 that project. I just want to correct the record.

16:08:10 9 Q. Okay. But you're familiar with the project? You're
16:08:14 10 familiar with this project, aren't you?

16:08:17 11 A. When you say "familiar with it," there's -- Stephen did
16:08:22 12 some of our wedges for this project.

16:08:25 13 Q. And you see the date here, July 16th, 2013?

16:08:30 14 A. I'm not seeing the 13 date. Where are you seeing that?

16:08:35 15 Q. Right where I'm pointing my finger. The bottom of the
16:08:38 16 page -- bottom of the second page.

16:08:43 17 A. I see that, yes.

16:08:44 18 Q. So let's take a look -- let's take a look at the NSS
16:08:51 19 drawings from that project, Defendant's exhibit 20.

16:09:10 20 THE COURT: Mr. Neusch, did I understand you to say
16:09:12 21 that Gibraltar -- no Gibraltar company had any part in the
16:09:17 22 construction at the United States Treasury in Birmingham,
16:09:23 23 Alabama, that that was done by NSS and Gibraltar was not
16:09:27 24 involved at all?

16:09:29 25 THE WITNESS: Well, there's a royalty payment. That

16:09:31 1 was done under our last agreement.

16:09:33 2 THE COURT: But you weren't involved in the contract

16:09:35 3 or any of the construction?

16:09:37 4 THE WITNESS: I never am. I just manufacture.

16:09:40 5 THE COURT: No, no. I thought I understood you to

16:09:42 6 say that someone else actually did the manufacturing and that

16:09:45 7 Gibraltar wasn't even involved in the manufacturing in the

16:09:47 8 Alabama Treasury job.

16:09:49 9 THE WITNESS: That is correct.

16:09:51 10 THE COURT: All right.

16:09:52 11 THE WITNESS: NSS outsourced it to Aaron Ling of Bad

16:09:55 12 Day Fabrication.

16:09:55 13 THE COURT: So, Mr. Rogers, why do we need to spend

16:09:58 14 any more of our precious time on this job?

16:10:03 15 MR. ROGERS: Because this job shows the detailed

16:10:05 16 drawings that he was referring to in his letter that he used in

16:10:07 17 the patent application.

16:10:08 18 THE COURT: Well, just ask him that question instead

16:10:09 19 of going over this page and after page when he says that they

16:10:13 20 weren't involved in it. Just ask him if he ever saw the

16:10:17 21 drawings before and did he use them.

16:10:18 22 MR. ROGERS: I understand.

16:10:18 23 THE COURT: We've taken way too much time to get

16:10:22 24 where I want to get today, and we're not there yet.

16:10:22 25 MR. ROGERS: This is my last set of questions.

16:10:25 1 Q. Defendant's Exhibit 20, are you there?

16:10:31 2 A. Exhibit 20?

16:10:32 3 Q. Defendant's Exhibit 20?

16:10:38 4 A. Okay.

16:10:38 5 Q. Take a look four pages in. You see the drawing?

16:11:03 6 A. Four pages in? I'm looking at a different drawing than

16:11:07 7 you are.

16:11:07 8 Q. Well, mine is two-sided, so it may be eight pages in. See

16:11:11 9 if you can find that page?

16:11:12 10 THE COURT: There's a difference between page and

16:11:14 11 sheet. So let's make sure we're using the same language.

16:11:33 12 A. Okay. I believe we're on the same page, no pun intended.

16:11:37 13 Q. I think the ninth page in. Do you see it? Do you see the

16:11:41 14 drawings that are up on the screen?

16:11:42 15 A. Yes.

16:11:42 16 Q. Do you see the date of that drawing?

16:11:44 17 A. Do I see what?

16:11:45 18 Q. Do you see the date of that drawing where I have it

16:11:49 19 highlighted? It's October 28th, 2013, correct?

16:11:58 20 A. October 28th, '13, yes.

16:12:00 21 Q. Yes. This NSS drawing of the finger wedge barrier dated

16:12:07 22 October 28th, 2013, is that the detailed drawing that you're

16:12:11 23 referring to in your letter to your son Stephen Neusch saying

16:12:15 24 you didn't use that drawing when you filed your patent

16:12:19 25 application on this?

16:12:20 1 A. This is not that drawing that we were talking about
16:12:24 2 earlier.

16:12:30 3 Q. This is the drawing from your patent application. That's
16:12:33 4 the drawing from NSS.

16:12:37 5 A. Okay. You said the drawing that Stephen did. I thought
16:12:40 6 you were referring to the one where he gave me the idea where
16:12:45 7 the concrete was in the middle and all that. His drawing that
16:12:50 8 I did not use is not this drawing.

16:12:54 9 Q. You said it was just a conceptual drawing, not a detailed
16:12:58 10 drawing?

16:12:58 11 A. Correct.

16:12:59 12 Q. But even though in your letter --

16:13:00 13 A. That's not this drawing. This drawing doesn't look
16:13:03 14 anything like what he gave me.

16:13:05 15 Q. See the date on this drawing, October 28th, 2013?

16:13:13 16 A. Yes.

16:13:13 17 Q. You used this drawing, didn't you? This is the detailed
16:13:17 18 drawing from your letter that you're referring to, and that's
16:13:20 19 the reason why you filed your patent application exactly one
16:13:24 20 year later, on October 28th, 2014, correct? That's not a
16:13:32 21 coincidence in the dates, is it?

16:13:34 22 A. This is -- this drawing -- I'm still not clear what you're
16:13:38 23 asking. It's one year apart, yes. You're correct. I don't
16:13:42 24 understand the question. This drawing here, this is my wedge
16:13:46 25 design. This is not the drawing Stephen did.

16:13:50 1 Q. This is your design?

16:13:51 2 A. Yes, sir.

16:13:53 3 Q. This is not the detailed drawing you were referring to in

16:13:57 4 your letter?

16:13:59 5 A. Okay. What letter and what detailed drawings? I may be

16:14:02 6 confused. I thought we were talking about the drawing Stephen

16:14:06 7 gave me back at the very beginning. What letter are you

16:14:11 8 referring to? No. That's what I thought you were talking

16:14:16 9 about. This absolutely is not that drawing.

16:14:18 10 Q. And it's just a coincidence?

16:14:20 11 A. It's not even close. This is -- I have that drawing. Be

16:14:24 12 glad to give it to the Court because it's nowhere close to

16:14:27 13 this.

16:14:27 14 Q. Okay. I appreciate your time today.

16:14:29 15 MR. ROGERS: No further questions.

16:14:37 16 THE COURT: Mr. Connor?

16:14:45 17 **REDIRECT EXAMINATION**

16:14:45 18 **BY MR. CONNOR:**

16:14:45 19 Q. Mr. Neusch, the drawings we were just looking at, are

16:14:50 20 those shop drawings or fab drawings?

16:14:55 21 A. I just closed it. Those are conceptual drawings. I mean,

16:15:01 22 that's all not -- fab drawings are very specific with gussets

16:15:05 23 and every part and piece and how they weld together. Those

16:15:09 24 aren't fab drawings, so that's a rendering of the system.

16:15:12 25 Q. A few minutes ago you mentioned that NEU Security Services

16:15:19 1 had contracted out with Aaron Ling.

16:15:24 2 A. Correct.

16:15:24 3 Q. What was name of Aaron Ling's business?

16:15:28 4 A. Bad Day Fabrication.

16:15:29 5 Q. And did Bay Day Fabrication make some of the structural

16:15:35 6 components for wedge barriers --

16:15:38 7 A. Yes.

16:15:38 8 Q. -- for NEU Security Services?

16:15:40 9 A. For that Birmingham, Alabama project, they did the

16:15:44 10 structural wedge barriers.

16:15:45 11 Q. Okay. And did you know that that was going on at the

16:15:48 12 time?

16:15:51 13 A. I don't recall the timing of when I found out. I do

16:15:55 14 remember I got upset at Stephen because we had no NDA with Bad

16:16:03 15 Day Fabrication, and then he turned around and subbed it to

16:16:06 16 somebody else and we had no NDA with them. And as part of our

16:16:10 17 licensing agreement, I had to approve any outsourcing because I

16:16:15 18 needed to protect our intellectual property. And so he did

16:16:19 19 that with -- he didn't follow our license agreement. We had

16:16:22 20 that discussion, you know. But that's I believe when I first

16:16:29 21 heard that he was fabricating those wedges.

16:16:31 22 Q. Did Bad Day Fabrication have access to Gibraltar's

16:16:37 23 detailed shop drawings to build your design of the wedge?

16:16:42 24 A. After the fact Stephen sued Aaron Ling on that project.

16:16:48 25 Aaron Ling blamed Gibraltar because Aaron called my guy

16:16:52 1 Curtis Turner and had to get the fabrication drawings for the
16:16:56 2 wedge for him to fabricate. So we got blamed for giving bad
16:17:04 3 fabrication drawings for that project.

16:17:08 4 Q. So fabrication drawings from Gibraltar were used by Bad
16:17:12 5 Day to make the wedge barriers for NEU Security Services?

16:17:15 6 A. That's correct.

16:17:16 7 Q. When you were discussing with Stephen Neusch the
16:17:24 8 termination agreement that you provided to him on the 4th of
16:17:30 9 February 2015 and that he returned to you signed on the 24th of
16:17:34 10 February 2015, 20 days later, at any point in time before he
16:17:40 11 signed and returned that agreement to you, did you and Stephen
16:17:44 12 Neusch discuss excluding the cable restraint barrier or pop-up
16:17:49 13 gate from the scope of the termination agreement?

16:17:52 14 A. No.

16:17:54 15 Q. Was Stephen Neusch involved in any of your negotiations
16:18:05 16 with Betafence?

16:18:11 17 A. When you say "any," that's a broad term. Stephen went
16:18:14 18 with me to meet with Beta back when we entered into the
16:18:21 19 original license agreement. He was not involved in any of my
16:18:25 20 discussions once we sold them the rights. Now, I know that
16:18:31 21 Beta obviously had concern with Stephen, and I know Stephen had
16:18:34 22 a meeting with Beta during that time. But it had nothing to do
16:18:39 23 with my agreement with Beta, and I wasn't involved with that
16:18:42 24 discussion.

16:18:43 25 Q. After the Betafence -- after the termination agreement in

16:18:50 1 February of 2015, were you willing -- was Gibraltar willing to
16:18:55 2 continue selling any -- these disputed products to NEU Security
16:19:00 3 Services?

16:19:01 4 A. Yes.

16:19:02 5 Q. It was the end of the exclusive between the companies?

16:19:06 6 A. Correct.

16:19:10 7 MR. CONNOR: No further questions, Your Honor.

16:19:11 8 THE COURT: Mr. Rogers?

16:19:12 9 MR. ROGERS: No further questions.

16:19:14 10 THE COURT: All right. You may step down.

16:19:31 11 MR. CONNOR: Judge, we rest.

16:19:34 12 MS. GHAVIMI: Your Honor, I call Stephen Neusch to
16:19:36 13 the stand.

16:19:37 14 THE COURT: You may. Mr. Neusch, you've previously
16:19:47 15 been sworn. You're still under oath.

16:19:57 16 **STEPHEN NEUSCH,**

16:19:57 17 having been first duly sworn, testified as follows:

16:19:57 18 **DIRECT EXAMINATION**

16:19:57 19 **BY MS. GHAVIMI:**

16:19:58 20 Q. Mr. Neusch, why would Gibraltar have possession of copies
16:20:01 21 of NSS files?

16:20:03 22 A. Because they moved them out of the shop and into their
16:20:09 23 location for storage when we vacated the fabrication facility
16:20:17 24 that we had. My dad didn't want to fund the excessive rent and
16:20:22 25 said to find a place with lower rent. So we moved. And

16:20:27 1 obviously on our own we couldn't pay the rent there in the
16:20:31 2 fabrication facility, so they sent trucks and employees up and
16:20:34 3 loaded up all the documents and took them to their shop.

16:20:37 4 Q. And those documents that Gibraltar loaded up and took to
16:20:41 5 their shop would be from the time period between 2013 and the
16:20:45 6 middle of 2015; is that correct?

16:20:47 7 A. I wasn't there. I was actually at Fort Carson when that
16:20:51 8 happened. But I -- that's what I've been told by accounting.

16:20:56 9 Q. Okay. So any old credit card receipts that would support
16:21:00 10 a credit card charge from that time period would be located in
16:21:04 11 those files?

16:21:05 12 A. That's correct.

16:21:06 13 Q. Okay. And did you use a -- your personal credit card for
16:21:12 14 both work and personal expenses?

16:21:16 15 A. Yeah. That's correct. You know, when he was up doing his
16:21:20 16 whole spiel about me taking all this money out and then trying
16:21:23 17 to recode it, it was ridiculous because my personal card was
16:21:29 18 the credit card that was used for business transactions and had
16:21:32 19 many business transactions, as you can see, back in 2012 and
16:21:36 20 2013 and all that. That's how it was coded. If it was a
16:21:38 21 personal expense, it would get coded personally. If it was a
16:21:43 22 business expense, it would get coded to business.

16:21:46 23 And so the accounting had not reconciled my credit
16:21:49 24 card charges for last period that they'd been doing, so it was
16:21:51 25 like \$120,000 worth of charges going back like six months or

16:21:55 1 so, the one everybody was talking about earlier. They had not
16:21:58 2 coded that, so there's going to be business charges in there
16:22:00 3 and there's going to be personal charges in there.

16:22:01 4 So I directed Teresa to put that in an account to be
16:22:07 5 allocated so someone would go through and allocate this to
16:22:11 6 business, whether it be a job or overhead, and this to
16:22:13 7 personal. This whole idea that, oh, we're changing this so we
16:22:18 8 can hide money or take money is ridiculous.

16:22:21 9 Q. But if you had credit card receipts that would support the
16:22:25 10 requests that the auditor had, you would give them to him,
16:22:29 11 wouldn't you?

16:22:30 12 A. That's correct.

16:22:31 13 Q. I'd like to move on to discuss BSP.

16:22:33 14 A. Well, hold on. As the auditor admitted, the \$4,000 charge
16:22:38 15 they were talking about that was pretty recent that was coded
16:22:41 16 to expense, we did give him the backup showing where he
16:22:42 17 actually admitted more of it -- it was actually a higher dollar
16:22:46 18 amount that was business. We only coded \$4,000 of it to
16:22:50 19 business.

16:22:50 20 Q. Okay. Thank you.

16:22:51 21 What kind of products does BSP sell?

16:22:54 22 A. Force protection products.

16:22:55 23 Q. And who are BSP's customers?

16:22:59 24 A. Primarily the federal government, both ...

16:23:03 25 Q. Does BSP fill a niche market?

16:23:06 1 A. Yeah. It's the force protection, anti-terrorism market is
16:23:11 2 really niche. It's the bollards you see outside this federal
16:23:14 3 courthouse here. We've actually done federal courthouses,
16:23:17 4 quite a few them, like Moakley Federal Courthouse, et cetera.

16:23:20 5 And that was just force protection anti-ram products.

16:23:23 6 Q. Because of the products that you sell, do your customers
16:23:27 7 often come to you with requests for you to make bids on
16:23:31 8 projects?

16:23:31 9 A. Yes. BSP, actually, most all of our business is on
16:23:37 10 request. We don't even solicit or advertise.

16:23:41 11 Q. Okay. And so what's your percentage of success in
16:23:45 12 obtaining a contract from a bid?

16:23:46 13 A. It's been very high with BSP. Like I said, you know,
16:23:50 14 we -- we get called for specific specialty products.
16:23:54 15 Especially some of the products, some of our biggest sale
16:23:59 16 products have been the ones that aren't offered otherwise in
16:24:02 17 the industry. We have an actual product that can fill a need
16:24:05 18 that no one else has, you know, with a certain amount of our
16:24:09 19 gates. So we've been getting a lot of work based on that.

16:24:12 20 Q. Okay. So how many active projects or ongoing projects
16:24:17 21 does BSP have right now?

16:24:19 22 A. Currently, I think we have half a dozen.

16:24:25 23 Q. Okay. How many projects has BSP completed since 2014 --
16:24:29 24 beginning of 2014?

16:24:30 25 A. Well, BSP didn't start operating or doing anything until

16:24:35 1 July of 2015. But since it's completed, I think, three
16:24:40 2 projects.

16:24:40 3 Q. Okay. So do you feel that the recent terrorist attacks
16:24:46 4 have increased the demand for the type of products that BSP
16:24:50 5 sells?

16:24:51 6 A. Absolutely.

16:24:52 7 Q. So if you were enjoined from selling the four disputed
16:24:56 8 products as well as any of the -- any of the products that
16:25:01 9 Gibraltar claims that it owns, would BSP suffer harm?

16:25:07 10 A. Well, BSP, if it couldn't sell force protection products,
16:25:11 11 it would be out of business.

16:25:13 12 Q. If BSP --

16:25:14 13 A. So, yeah, I would say it would be harmed.

16:25:16 14 Q. If BSP were not able to sell force protection products,
16:25:21 15 would it lose market share?

16:25:22 16 A. Well, the market share has -- yeah. It would lose that.

16:25:25 17 Q. Are there a limited number of companies that sell these
16:25:28 18 force protection products?

16:25:30 19 A. Yes. That's why they call it a niche market. Not very
16:25:34 20 many people do it. That's why my dad is so desperate to get in
16:25:38 21 it and claim everything as his and take over my portion.

16:25:40 22 Q. Okay. I'd like you to turn to Defendants' Exhibit 61.

16:25:46 23 A. Okay.

16:26:05 24 Q. Is this a contract that BSP has entered into for the
16:26:08 25 sale -- sale or installation of force protection products?

16:26:11 1 A. Yes.

16:26:12 2 Q. Could you read to me the amount that's listed on the first

16:26:15 3 page for the contract.

16:26:16 4 A. \$128,852.06.

16:26:20 5 Q. Okay. I'd like you to turn to Defendants' Exhibit 62. Is

16:26:25 6 this another contract that BSP has entered into for the sale or

16:26:29 7 installation of force protection products?

16:26:31 8 A. Yes.

16:26:31 9 Q. Could you read to me the amount of the total contracts?

16:26:35 10 A. \$281,535.

16:26:38 11 Q. Okay. I'd like you to turn to Defendants' Exhibit 63.

16:26:44 12 A. That was 63. I don't have -- here it is. Sorry. Okay.

16:26:53 13 Q. Is this an invoice for payment on a contract that BSP has?

16:26:59 14 A. Yes.

16:27:00 15 Q. Okay. Could you read to me the amount of the original

16:27:06 16 contract sum.

16:27:07 17 A. \$392,000.

16:27:08 18 Q. Could you turn to the next page. Could you read to me for

16:27:15 19 what product this contract is selling and installing?

16:27:20 20 A. This product -- this project is selling -- wait. We're on

16:27:29 21 63?

16:27:29 22 Q. Yes. NSS 4834 is the bottom of the page.

16:27:33 23 A. The restraint barrier and -- yeah. Restraint barrier.

16:27:42 24 Q. So I see where it says on line four M50 cable restraint

16:27:49 25 barriers, scheduled value \$280,000; is that correct?

16:27:53 1 A. Yes.

16:27:54 2 Q. Installation, the line below, about \$60,000; is that

16:27:58 3 correct?

16:27:58 4 A. Yes.

16:27:59 5 Q. So is a typical contract for sale that BSP enters similar

16:28:06 6 to the prices of these few contracts we've just discussed?

16:28:11 7 A. Yeah. We have a lot of pending ones, and we've even been

16:28:15 8 promised award on more that are this amount, if not more.

16:28:18 9 Q. Okay. So at any one time, BSP may be involved in half a

16:28:22 10 dozen contracts, each worth around \$300,000?

16:28:25 11 A. That's correct.

16:28:26 12 Q. So if BSP were enjoined, is bond of a million dollars

16:28:31 13 reasonable because BSP could lose one or more contracts in the

16:28:35 14 next year as a result of this injunction and being prevented

16:28:38 15 from selling products and would result in losses that would

16:28:43 16 total one or more of the total value of these contracts?

16:28:47 17 A. I think a million dollars is low, but yeah.

16:28:49 18 Q. Okay. I'd like to move on to Defendants' Exhibit 65.

16:29:13 19 A. Okay.

16:29:14 20 Q. Is this a contract that NSS had for installation of --

16:29:23 21 sale and installation of products at a San Diego private office

16:29:31 22 building?

16:29:32 23 A. It's FBI. It's FBI San Diego, and it was for force

16:29:36 24 protection products. That's correct.

16:29:38 25 Q. Could you read to me the amount of this project --

16:29:41 1 contract?

16:29:42 2 A. \$985,000.

16:29:44 3 Q. Okay. Could you turn to the next page. What products

16:29:50 4 were involved in this contract?

16:29:54 5 A. Wedge barriers and M50 P2 fence.

16:29:57 6 Q. Okay. Could you turn to Exhibit 66.

16:30:05 7 A. Okay.

16:30:06 8 Q. Is this a contract that BSP entered into between -- I'm

16:30:11 9 sorry -- NSS for sale and installation of force protection

16:30:19 10 products at Fort Gillem, Georgia?

16:30:21 11 A. Yeah. It's an NSS contract where we provided the

16:30:25 12 restraint barriers and M50 P2 fence for Fort Gillem.

16:30:29 13 Q. Could you read to me the amount of this contract.

16:30:32 14 A. 500,000 -- \$514,000.

16:30:37 15 Q. Okay. So if NSS were enjoined from being able to sell any

16:30:45 16 one of these four products, it could potentially lose a

16:30:50 17 contract in the amount of a million dollars?

16:30:53 18 A. That's correct.

16:30:53 19 Q. So if NSS were enjoined from selling all four of these

16:30:57 20 products -- let me rephrase.

16:30:59 21 If NSS were enjoined from being able to manufacture,

16:31:02 22 advertise, offer for sale, or sell any of the four disputed

16:31:07 23 products, it could be harmed in an amount of greater than a

16:31:12 24 million dollars because it could potentially lose more than one

16:31:16 25 contract in any one year; is that correct?

16:31:18 1 A. That's correct.

16:31:19 2 Q. Okay. I just want to go through and explain something

16:31:44 3 that we have discussed before. If you could turn to

16:31:47 4 Plaintiffs' Exhibit -- Defendants' Exhibit 35.

16:32:00 5 A. Okay.

16:32:01 6 Q. Is this the e-mail that you received from your father on

16:32:03 7 the morning of February 4th, 2015 that attached a soft copy of

16:32:08 8 the termination letter for you to review?

16:32:11 9 A. This is the e-mail, yes.

16:32:13 10 Q. What's the time of that e-mail?

16:32:16 11 A. It is 10:54 a.m. Well -- yes. That Bill Neusch sent it

16:32:26 12 to me.

16:32:27 13 Q. Okay. Could you turn to the last page of this exhibit

16:32:31 14 where it says NSS 34 Bates number at the bottom.

16:32:35 15 A. Yes. It's a copy of the termination agreement that does

16:32:39 16 not have "and personally" on the bottom.

16:32:43 17 Q. So what you're saying is underneath your -- the place for

16:32:46 18 your signature of Stephen Neusch, comma, President, NSS, the

16:32:50 19 words "and personally" are not here?

16:32:52 20 A. No, they were not. As I testified to earlier, the copy

16:32:55 21 they gave me for review did not have that included.

16:32:58 22 Q. And did you have a telephone conversation with your father

16:33:01 23 after receiving this e-mail and soft copy of the termination

16:33:04 24 letter?

16:33:06 25 A. Yeah. We talked about it, and he even came to my office

16:33:10 1 once and talked about it, too. But we talked about it in that
16:33:14 2 conversation. He was, like, you know, this really isn't going
16:33:17 3 to affect you because the only products they're really buying
16:33:19 4 is the M50 P1 fence and the ones that he had certifications
16:33:24 5 for. Everything else that's engineered, it doesn't really
16:33:26 6 matter because it's engineered. So that shouldn't hurt you in
16:33:27 7 any way. He was trying to, I guess, soften the blow of selling
16:33:29 8 those away. And so he explained that to me.

16:33:33 9 Also I have e-mails from Jim Bryer explaining this
16:33:36 10 was requested of me to sign by Betafence, and it's just a
16:33:39 11 one-pager to memorialize to get the sale done for Betafence.
16:33:45 12 So this was obviously Betafence's idea and creation to have me
16:33:50 13 do this termination letter so he could complete his sale and
16:33:53 14 make \$8 million.

16:33:54 15 Q. Okay. So could you turn to Exhibit 36.

16:33:57 16 A. Yep. Okay.

16:33:58 17 Q. So does this e-mail confirm your understanding that
16:34:01 18 Betafence was reviewing the termination letter?

16:34:04 19 A. Yes. They were the ones that were pushing the -- pushing
16:34:09 20 this one down the road.

16:34:10 21 Q. Do you see the timing of this e-mail?

16:34:12 22 A. Yes. This is at 11:38 the same day, an e-mail from
16:34:17 23 Jim Bryer to Betafence regarding the termination letter. So
16:34:20 24 they took the one they sent me to review, the soft copy that
16:34:24 25 did not have "and personally" and obviously sent it to

16:34:27 1 Betafence.

16:34:28 2 Q. And could you turn the page. Is that a copy of the

16:34:34 3 termination letter?

16:34:35 4 A. It is. And there again, not with "and personally" on

16:34:39 5 there.

16:34:39 6 Q. Okay. If you could just turn to Exhibit 37.

16:34:44 7 A. Okay.

16:34:44 8 Q. And is this the copy of the e-mail that Jim Bryer sent you

16:34:49 9 with your father's signed copy of the termination agreement

16:34:52 10 asking you to sign it?

16:34:54 11 A. That is correct.

16:34:56 12 Q. And what's the -- what's the time of that e-mail?

16:34:59 13 A. It's the same day at 4:53 p.m.

16:35:03 14 Q. And could you turn over to the next page. Is the words

16:35:07 15 "and personally" listed there?

16:35:08 16 A. They are.

16:35:09 17 Q. Okay.

16:35:10 18 A. So sometime between them giving it to Betafence and

16:35:14 19 sneaking it back to me, they added "and personally" by

16:35:18 20 Betafence or at the direction of. But this is all they

16:35:20 21 produced, so ...

16:35:21 22 Q. Okay. Now, you heard Mr. Reynolds state that he's

16:35:38 23 determined that NSS did not pay Gibraltar for the Stratcom --

16:35:44 24 Stratcom materials. Do you remember that?

16:35:46 25 A. That's correct.

16:35:47 1 Q. Okay. Was there a payable recorded on NSS's books to
16:36:07 2 Gibraltar for the Stratcom materials?

16:36:10 3 A. There was a payable of 300-something thousand recorded,
16:36:17 4 because the deal I had with Gibraltar was the inventory there
16:36:21 5 at their yard was mine to use at the cost that they had
16:36:25 6 recorded for the raw material plus like, I think, 10 percent
16:36:30 7 handler or it may have just been the royalty. I don't
16:36:33 8 remember, but it was like plus 10 percent or something.

16:36:36 9 So we created -- because Gibraltar had us create the
16:36:40 10 invoice, they didn't have a record of it in their system. We
16:36:45 11 created one. We put it in our system for -- just so everyone
16:36:49 12 is clear, the Stratcom invoice also has product that's not
16:36:53 13 Gibraltar's. It's got -- that wasn't owned by Gibraltar. It
16:36:58 14 was owned by NSS and our inventory at their yard because they
16:37:02 15 let us use their yard to store our stuff and our inventory,
16:37:06 16 too. So that is not included on the invoice that we recognize
16:37:10 17 from a Gibraltar.

16:37:11 18 And then I know there's multiple variations of the
16:37:14 19 invoice that we had in our system from Gibraltar going back and
16:37:17 20 forth trying to settle what was Gibraltar's and what was ours
16:37:21 21 and what amount should be charged. So I know I've seen a
16:37:24 22 bunch. But, ultimately, I know that later on Gibraltar had
16:37:28 23 their accounting in their office always reconciling, and the
16:37:31 24 drive by Jim Bryer and Bill Neusch was constantly to make sure
16:37:34 25 that the Gibraltar payables -- I mean, Gibraltar receivables

16:37:38 1 match the NSS payables. I have e-mails to it. They've said it
16:37:42 2 100 times. They wanted our books reconciled with each other.
16:37:46 3 They had Donna Lilley tasked with that in our office.
16:37:50 4 She made changes to our books and told our accountants what to
16:37:53 5 add and what to take away. That's the reason you also see the
16:37:55 6 royalties that I didn't agree with in there. But then also I
16:37:59 7 remember getting in a fight about that -- I have e-mails to
16:38:01 8 it -- but getting in a fight about the payable for Stratcom. I
16:38:05 9 was, like, there needs to be a payable for the amount of
16:38:08 10 product that we're using of Gibraltar's in there. They're
16:38:10 11 like, no, we don't have these in our books. They're not in our
16:38:13 12 books. There's no invoice for those. Those can't be there.
16:38:17 13 That all -- that all happened, and we have the information on
16:38:19 14 that.

16:38:20 15 Q. So what you're saying is that the credit that appeared for
16:38:28 16 the payable --

16:38:31 17 A. -- was directed by Gibraltar because they wanted the books
16:38:34 18 to reconcile.

16:38:35 19 Q. So --

16:38:35 20 A. And what I'm also saying is the idea that Gibraltar didn't
16:38:38 21 receive any money for the -- the Stratcom invoice is wrong.
16:38:42 22 Gibraltar received full benefit of the \$722,000 that came in.

16:38:47 23 Q. Okay. I'm going to ask you about that.

16:38:49 24 A. Okay.

16:38:49 25 Q. So if you could turn to Exhibit 55. And turn to the

16:39:05 1 second page.

16:39:09 2 A. Okay.

16:39:10 3 Q. Is this a printout of NSS's Wells Fargo checking account
16:39:16 4 from September 2014?

16:39:18 5 A. Yes. And the top highlighted one is obviously the money
16:39:21 6 that came into the Wells Fargo account from Stratcom for
16:39:24 7 \$724,000.

16:39:25 8 Q. Okay. And did you e-mail your father and Jim Bryer a cash
16:39:30 9 flow projection that showed this money coming in?

16:39:33 10 A. Yes. Gibraltar was in possession of cash flow projections
16:39:40 11 and also our books that had the receivable for \$724,000 shown
16:39:44 12 on it. And they were told when it was coming in and when we
16:39:47 13 could expect it and then where the money would go from there.

16:39:50 14 Q. And you can see that cash flow projection on NSS95 which
16:39:54 15 is a couple of pages over.

16:39:57 16 A. Ninety-five?

16:39:57 17 Q. In that exhibit. So flip.

16:40:01 18 A. Oh, Bates number. Okay. Yeah.

16:40:06 19 Q. Okay. And then the very next page NSS96, is this an
16:40:10 20 e-mail chain between you and Jim Bryer and your father where
16:40:16 21 Gibraltar is directing where -- where NSS should deposit money
16:40:22 22 and how much?

16:40:22 23 A. That's correct. It's an e-mail communication between me
16:40:25 24 and Jim Bryer where he's telling me amounts of money he wants
16:40:29 25 deposited and to which one of his bank accounts for the

16:40:32 1 temporary loan.

16:40:34 2 So as I was saying before, this came in, you know,
16:40:39 3 not by itself. There was other receivables that came in as
16:40:43 4 cash flow. So we got the \$724,000 with others that would come
16:40:45 5 up to a net amount of receivables. We obviously at the time,
16:40:49 6 the reason Gibraltar was funding us, we had more payables than
16:40:53 7 receivables. So it was, one, they wanted -- everything was
16:40:57 8 always they wanted their loan, their temporary loan, paid down
16:41:00 9 first because they were the most unsecured on that. They've
16:41:03 10 had many meetings with their attorneys, plenty of paperwork
16:41:06 11 regarding this. They wanted to make sure that Wells Fargo
16:41:10 12 couldn't step in front of their bonded receivables, and they
16:41:12 13 were constantly working to keep Wells Fargo at arm's length so
16:41:16 14 they couldn't step in front of their receivables.

16:41:18 15 So they always wanted their cash flow part paid
16:41:21 16 first. So, as you can see, that's always been a big push of
16:41:24 17 Jim Bryer's. And then the remaining amount of money of the
16:41:26 18 receivables that came in on that date -- not just Stratcom, but
16:41:31 19 the other ones -- we talked about which payables we wanted it
16:41:33 20 apply to. So the money went to pay back a short-term loan from
16:41:39 21 Gibraltar and went to pay payables that Gibraltar would have
16:41:41 22 been responsible for and would have paid had we not had X
16:41:46 23 amount come in from receivables on bonded projects and bonded
16:41:49 24 payroll.

16:41:50 25 Q. Okay. If you can please turn to NSS 62, the Bates number.

16:41:54 1 Turn over a couple of more pages.

16:41:57 2 A. Okay.

16:41:57 3 Q. Actually, no. I'm sorry. Turn to Defendants' Exhibit 56.

16:42:04 4 A. Okay.

16:42:05 5 Q. And I'm at NSS62. It's the specific page.

16:42:12 6 A. Okay.

16:42:12 7 Q. Is this a listing of NSS's I believe it's sweep account?

16:42:21 8 A. Yes. So the way our bank account -- Wells Fargo set it

16:42:25 9 up, it's a theft protection thing. So you have one bank

16:42:28 10 account that your money sits in and the one you write checks

16:42:31 11 out of. And then it moves from the bank account that it's held

16:42:35 12 in to match the exact amount of checks being written so that

16:42:39 13 someone can't use the checking number to write a false check or

16:42:42 14 something like that or drain your bank account. So this is

16:42:43 15 essentially the same thing. It's just two checking account

16:42:47 16 numbers. But this is where the money went out. This is the

16:42:49 17 checking account where the money went out. You can see the

16:42:51 18 detail on that.

16:42:53 19 Q. And we're going to follow that.

16:42:54 20 A. Okay.

16:42:55 21 Q. So do you see underlined check number 19203 for \$240,000?

16:43:01 22 A. Come again? What?

16:43:04 23 Q. Look up on the screen.

16:43:05 24 A. I'm looking right here.

16:43:06 25 Q. Okay. Check 19203, \$240,000?

16:43:10 1 A. Yes. I see it.

16:43:11 2 Q. Okay. That went out on September 5th?

16:43:14 3 A. I see it.

16:43:15 4 Q. Okay. Turn to Exhibit 59 and have that in front of you.

16:43:20 5 A. Okay.

16:43:25 6 Q. And I believe it's on the second page. Do you see a bill

16:43:35 7 payment check, Number 19203 to Foundation Fence?

16:43:45 8 A. Yes.

16:43:45 9 Q. Okay. Do you see check number 19243 in the last column

16:43:52 10 over there?

16:43:52 11 A. Yes.

16:43:53 12 Q. \$341,000?

16:43:55 13 A. I do.

16:43:55 14 Q. Okay. Look at Exhibit 59, the first page. Do you see a

16:44:03 15 check on the 17th, 19243, to Gibraltar materials?

16:44:08 16 A. On which exhibit?

16:44:09 17 Q. Fifty-nine.

16:44:11 18 A. Yes, I do.

16:44:19 19 Q. Does it say "loan from FFI"?

16:44:23 20 A. Yes.

16:44:24 21 Q. Okay. Right below it do you see check number 19244 to

16:44:33 22 Foundation Fence, loan from FFI, for \$350,000

16:44:34 23 A. Yeah. I see them all relayed over to Foundation Fence.

16:44:42 24 Q. Okay. So all of the money that Gibraltar was directing

16:44:44 25 you to pay out that came in from Stratcom went to Gibraltar?

16:44:48 1 A. Yes. The physical money that came in from Stratcom went
16:44:52 2 to Gibraltar and the benefit of Gibraltar -- I've said this 100
16:44:55 3 times. Also my father and them testified I think in one of the
16:44:58 4 previous hearings that they had no idea about this money.

16:45:01 5 Well, subsequently, I also testified not only did they not know
16:45:06 6 about the money, they had a meeting -- they called their
16:45:08 7 attorneys in to have a meeting to go over all of the bonded
16:45:12 8 jobs, where in that meeting they had a copy of the actual
16:45:15 9 invoice knew about it.

16:45:16 10 And my dad's actual statement was when they talked
16:45:20 11 about, well, did you pay the materials on that job, he said no.
16:45:22 12 As you can see, it went to the cash flow of the bonded jobs.
16:45:25 13 My dad's actual comment was, Well, yeah, six of one, half a
16:45:29 14 dozen of the other, it's going to get the jobs done. They had
16:45:32 15 known about it. He knew about it. He likes to hide behind
16:45:36 16 memory issues to act like he never knew about it.

16:45:38 17 Q. Okay. Could you turn to Exhibit 57.

16:45:41 18 A. Yes.

16:45:42 19 Q. Is this first page and the second page part of the request
16:45:57 20 that was sent to the government?

16:46:00 21 A. Yeah. That is the billing question.

16:46:02 22 Q. Okay.

16:46:03 23 A. And as you can --

16:46:05 24 Q. Did you --

16:46:06 25 A. Go ahead.

16:46:07 1 Q. Did NSS send this to Gibraltar in mid-2015?

16:46:11 2 A. Yeah. It was sent to them for that meeting with his

16:46:14 3 attorneys so they could strategize about bonded money. They

16:46:19 4 had it in their possession, so that's why I'm saying their

16:46:21 5 testimony saying they never saw it is ridiculous.

16:46:24 6 Q. Let's look at Exhibit 60.

16:46:29 7 A. Okay.

16:46:30 8 Q. Is that the e-mail you're referring to with the meeting

16:46:33 9 with the attorneys?

16:46:33 10 A. Yes. That's the e-mail where I sent him the invoice. As

16:46:36 11 you can see, Jim Bryer is there, Bill Neusch is there, their

16:46:40 12 attorneys are all on there.

16:46:42 13 Q. Okay. And attached to this e-mail, is that this request

16:46:46 14 for payment?

16:46:47 15 A. That is correct. That is the Stratcom bill.

16:46:50 16 Q. And it was at this meeting that the Stratcom invoice was

16:46:55 17 discussed?

16:46:56 18 A. Yeah. It was at this meeting where -- because we went

16:46:59 19 through it job by job, and that's the reason they had me send

16:47:03 20 them this. And they talked about where this bill, was it paid?

16:47:07 21 Yes. Where did the money go? Here's where the money went. It

16:47:10 22 was all explained. Were the materials paid for? No. The

16:47:10 23 material is still sitting at the job. It went to the benefit

16:47:12 24 of Gibraltar paying back their loans and bonded work. And my

16:47:17 25 dad knew that, and he was okay with it. His exact words were

16:47:19 1 "that's fine" to his attorneys and everyone else.

16:47:22 2 Q. So Gibraltar's statements now that --

16:47:24 3 A. Now they're trying -- because they're adversarial to me
16:47:28 4 and trying to overreach and take products and put me out of
16:47:31 5 business, they're claiming everything they can as fraud or bad
16:47:34 6 misdealings and using bad memory or lies.

16:47:48 7 MS. GHAVIMI: If I could have one moment, Your Honor.

16:48:08 8 No further questions, Your Honor. Pass the witness.

16:48:11 9 **CROSS-EXAMINATION**

16:48:11 10 **BY MR. CONNOR:**

16:48:12 11 Q. You just went through a number of contracts with us, and I
16:48:16 12 think you said that they showed that Black Security products is
16:48:27 13 currently selling, has sold, has bid, and won contracts on some
16:48:32 14 of four disputed products; is that correct?

16:48:38 15 A. Just one. The restraint barrier, as I testified to
16:48:42 16 earlier.

16:48:42 17 Q. So when you testified this morning that Defendants have
16:48:47 18 not manufactured or sold any of these products after February
16:48:50 19 the 4th, 2015, after the termination agreement, that's not
16:48:55 20 true, is it?

16:48:58 21 A. No. Read my testimony. My exact words were there's one
16:49:01 22 project with the restraint barrier that I know that the
16:49:04 23 contract, you know, is either getting executed now or already
16:49:09 24 has been executed. But it has one project with a restraint
16:49:13 25 barrier. That's the same one we looked at here. My testimony

16:49:16 1 is the same.

16:49:17 2 Q. So of all those contracts you just walked us through,
16:49:20 3 there's only one that has anything to do with any of these
16:49:22 4 disputed products?

16:49:23 5 A. For BSP. She went through others for NSS that also have
16:49:26 6 to do with those disputed products.

16:49:26 7 Q. So both BSP, Black Security Products, and NEU Security
16:49:29 8 Services are actively marketing, selling, bidding on contracts
16:49:35 9 and winning contracts on these disputed products right now?

16:49:39 10 A. No. We're waiting to see what happens with this lawsuit.

16:49:44 11 Q. So you haven't bid on any jobs with the disputed products?

16:49:48 12 A. Okay. We're going back over --

16:49:49 13 Q. Just answer my question, Mr. Neusch.

16:49:51 14 A. I've already answered this question. I'll answer it
16:49:53 15 again.

16:49:53 16 THE COURT: No. I want to hear it. Yeah. Give me
16:49:55 17 the answer. Have you bid on any jobs on any of the four
16:49:58 18 disputed products?

16:50:01 19 THE WITNESS: The restraint barrier is one of the
16:50:04 20 disputed products that we are getting a contract completed on.
16:50:09 21 But, to be technical to answer your a question, I believe that
16:50:13 22 project was bid before the 2015 February date. So it's not in
16:50:18 23 violation of the termination agreement. We have not bid, as
16:50:21 24 our complaint says, from the termination agreement date past
16:50:25 25 that any of those four products.

16:50:28 1 Q. (BY MR. CONNOR) So if the Court agrees with Gibraltar and
16:50:35 2 says you cannot do that, you must comply with the termination
16:50:39 3 agreement, all that business that you talked about would be
16:50:43 4 unaffected. All those contracts wouldn't make a hill-of-beans
16:50:49 5 difference, would it?

16:50:50 6 A. Well, we have a ton of pending contracts with the
16:50:53 7 restraint barrier, the other ones. Yeah. We're waiting to see
16:50:55 8 what happens here in this lawsuit because they brought this
16:50:58 9 action against me. I didn't bring the action against them.

16:51:01 10 Q. So you've heard testimony and you've testified about the
16:51:04 11 license agreement that you and Gibraltar were operating under
16:51:08 12 until it was terminated in February of 2015?

16:51:11 13 A. That's correct.

16:51:12 14 Q. Okay. And Gibraltar says it was terminated. You've heard
16:51:15 15 that. And that extinguished all license rights that you had,
16:51:19 16 although you and Mr. Neusch say you could still buy the
16:51:23 17 products. And you've said the termination agreement, based on
16:51:27 18 your understanding, only related to the cable crash fence,
16:51:30 19 correct?

16:51:31 20 A. That's correct.

16:51:32 21 Q. Okay. So are you saying that Gibraltar did not have the
16:51:36 22 right and still doesn't have the right to terminate your
16:51:42 23 license to the Gibraltar products that you were operating
16:51:47 24 under?

16:51:48 25 A. That is correct. The -- okay. Rephrase the question.

16:51:52 1 That was a very long question. Can I get a shorter version.

16:51:56 2 I'm kind of confused.

16:51:59 3 Q. Do you understand my question, sir?

16:52:02 4 A. I just said I didn't. It was very long. I'm not

16:52:06 5 following.

16:52:06 6 Q. Okay. Are you -- is it your position that Gibraltar

16:52:13 7 cannot terminate the license rights that it had granted to NEU

16:52:18 8 Security Services for these other three products?

16:52:26 9 A. Well that is what we're saying. They didn't have sole

16:52:30 10 right to tell us we can't do anything with them.

16:52:34 11 Q. So is that a yes?

16:52:36 12 A. That's correct.

16:52:37 13 Q. So right now the status quo, Mr. Neusch, is that you're

16:52:48 14 not bidding on any jobs that would -- that you would spec the

16:52:57 15 disputed products on, you're not manufacturing the disputed

16:53:01 16 products, and you're not selling them; is that correct?

16:53:03 17 A. No. That's not correct. We are selling them. We're

16:53:06 18 about to start manufacturing the restraint barrier. As a

16:53:09 19 matter of fact, the wedge barrier Gibraltar refused to sell me

16:53:13 20 because I was going to have them fabricate the wedge barrier on

16:53:17 21 the Hawaii job. Jim Bryer sent me an e-mail saying they no

16:53:18 22 longer want to sell me any of that, which would be in violation

16:53:21 23 of their supposed contract. But the -- and it got me that

16:53:24 24 contract canceled.

16:53:25 25 I have since not done anything because we've been

16:53:29 1 sideways and in this lawsuit. He told me at the beginning of
16:53:32 2 this year that they would not provide me the finger wedge
16:53:35 3 barrier, and then we got in this lawsuit. So I have not bid
16:53:40 4 any finger wedge barriers.

16:53:44 5 Q. Thank you for your time, Mr. Neusch.

16:53:46 6 MR. CONNOR: No further questions, Your Honor.

16:53:49 7 **REDIRECT EXAMINATION**

16:53:49 8 **BY MS. GHAVIMI:**

16:53:49 9 Q. Mr. Neusch, if BSP were enjoined from selling a cable
16:53:55 10 restraint barrier, the current contract for \$392,000 where BSP
16:54:02 11 is obligated to install the cable restraint barriers, would BSP
16:54:07 12 be in breach of that contract?

16:54:09 13 A. If BSP was told that they could not provide that barrier
16:54:16 14 on that project, yeah, we would be in breach of that contract.

16:54:19 15 Q. Okay. All of the contracts that we discussed regarding
16:54:24 16 NSS occurred in the past; is that correct?

16:54:26 17 A. That's correct.

16:54:27 18 Q. So if NSS were unable to go out and bid on projects
16:54:32 19 because it were unlawfully enjoined, it could lose out on the
16:54:37 20 value of any one contract of a million dollars; is that
16:54:42 21 correct?

16:54:42 22 A. Yeah. If what you're getting at is that, if they can't
16:54:46 23 sell the product, then it wouldn't be able to get the contract.

16:54:49 24 That is correct.

16:54:50 25 Q. So right now NSS could potentially go out and bid on

16:54:54 1 projects for any one of these four products and obtain a
16:55:00 2 contract for a value of half a million dollars if it were
16:55:04 3 permitted to sell these product; is that correct?
16:55:06 4 A. It could obtain a contract for a million dollars.
16:55:10 5 Q. But because of the current lawsuit and the potential of
16:55:14 6 being enjoined, it's unable to do so?
16:55:17 7 A. Well, if it gets enjoined, it won't be able to do so.
16:55:21 8 But, yeah, we're trying to figure out -- let a third party,
16:55:25 9 i.e., the Judge, decide whose product or what rights someone
16:55:30 10 has. You know, obviously, this whole thing is kind of murky.
16:55:34 11 Q. If BSP were enjoined from selling these four products,
16:55:37 12 would it affect its ability to sell other products and get
16:55:42 13 contracts on those other products?
16:55:43 14 A. What was the question?
16:55:44 15 Q. Isn't it true that many contracts require the inclusion of
16:55:52 16 at least one of these four disputed products as well as
16:55:55 17 products that are not here, and so BSP could potentially lose
16:56:00 18 out on a contract because it is unable to include one of these
16:56:04 19 four products in that bid?
16:56:06 20 MR. CONNOR: Objection. Leading.
16:56:07 21 A. I understand. I understand what your question was.
16:56:09 22 Yes. A lot of times a contract, you know, has
16:56:12 23 multiple products. So you would lose the entire contract if
16:56:15 24 you couldn't sell one of the multiple products. For example,
16:56:18 25 this courthouse has bollards outside, wedge barriers, and drop

16:56:22 1 arms. So if the wedge barrier -- that finger wedge barrier and
16:56:24 2 the rest of the bollards are something I get somewhere else, I
16:56:26 3 would lose the entire scope of the contract, not just the
16:56:29 4 portion that pertains to one of these four products.

16:56:31 5 Q. How many of the BSP bids that it has bid in the last year
16:56:36 6 have included one of these four products and products that are
16:56:39 7 not one of these four products?

16:56:43 8 A. Well, BSP or NSS?

16:56:45 9 Q. BSP.

16:56:47 10 A. Well, BSP, the pricing it does for, like, a wedge barrier,
16:56:54 11 it just costs us a heck of lot more because we have to get the
16:56:58 12 wedge barrier from someone else instead of build our own,
16:57:01 13 right, so it costs a lot more not to be able to use those. But
16:57:05 14 I don't know. I'm not looking at our bids. I'd have to go
16:57:08 15 back though and look at our sales and what our bids are.

16:57:11 16 MS. GHAVIMI: No more questions.

16:57:13 17 THE COURT: Mr. Connor.

16:57:15 18 **RECROSS-EXAMINATION**

16:57:15 19 **BY MR. CONNOR:**

16:57:15 20 Q. You can buy those products from RSSI or Delta Scientific
16:57:20 21 or any other of the supplies other than Gibraltar?

16:57:25 22 A. Well, to elaborate on my dad's argument that I have
16:57:30 23 somehow tarnished their name because I compete, he competes
16:57:35 24 with Delta Scientific and RSSI, and they don't like him because
16:57:39 25 we used to sell those products against them. So, no, RSSI

16:57:43 1 would not sell me that product because of my relation -- or
16:57:45 2 previous relation to Gibraltar.

16:57:48 3 The same with Delta Scientific. We also got in a
16:57:50 4 lawsuit with them because they got mad, one, because their
16:57:53 5 wedge barrier didn't work which is one of the reasons I wanted
16:57:56 6 to make my own, i.e., bringing this one to my father. But they
16:58:00 7 won't sell me either, as he knows. So the same argument he
16:58:02 8 makes that, aw, man, these integrators won't talk to us, good
16:58:06 9 luck. The manufacturers won't talk to me.

16:58:08 10 Q. Mr. Neusch, we heard testimony that NEU Security Services
16:58:12 11 is 5- or 10-million dollars in the hole today?

16:58:19 12 A. The testimony, I believe, was that it has 5- to 10-million
16:58:23 13 dollars in payables.

16:58:24 14 Q. In negative equity is what Mr. Reynolds said. Do you
16:58:28 15 remember that?

16:58:28 16 A. I could have sworn he said payables.

16:58:31 17 Q. Is -- do you take responsibility for that?

16:58:34 18 A. I'm the manager of NSS, so I take a lot of responsibility
16:58:39 19 for the outcome. But, obviously, things happen with a business
16:58:43 20 that are beyond your control. There's lawsuits. I mean, if
16:58:46 21 you want to get into that whole story, my dad --

16:58:48 22 Q. Are you responsible for the current financial condition of
16:58:52 23 NEU Security Services, sir?

16:58:54 24 A. I think -- okay. Like I was just responding to, there is
16:58:59 25 a lot of stuff that happened at NSS that is outside of my

16:59:03 1 control. Okay? So there is also things that I contributed.
16:59:08 2 With any business owner, there's decisions I made that I may
16:59:11 3 have made wrong. There's decisions I made that I made
16:59:13 4 correctly. Ultimately, do I think that I'm the reason that NSS
16:59:19 5 is this much in the hole? No.

16:59:22 6 MR. CONNOR: That's all, Your Honor.

16:59:29 7 MS. GHAVIMI: Your Honor, we rest.

16:59:31 8 THE COURT: All right. You may step down.

16:59:36 9 All right anything further in the way of evidence
16:59:38 10 from the plaintiff?

16:59:39 11 MR. CONNOR: No, Your Honor. We rest.

16:59:40 12 THE COURT: All right. Anything further in the way
16:59:43 13 of evidence from the defendant?

16:59:44 14 MS. GHAVIMI: No, Your Honor.

16:59:44 15 THE COURT: All right. Then the evidence portion is
16:59:47 16 closed on the request for temporary receivership and temporary
16:59:55 17 injunction.

16:59:55 18 Now, I'm going to want to hear you argue this in not
16:59:58 19 a general way, but in a specific way. We're not going to do it
17:00:06 20 this afternoon. How much time do you think you would need to
17:00:09 21 argue this phase of the case, which is only the temporary
17:00:14 22 relief? I'll start with the plaintiff just because that's a
17:00:19 23 convenient default.

17:00:23 24 MR. TAYLOR: Your Honor, I'd say for our side, a
17:00:25 25 total of 45 minutes, maybe 30 to open and 15 to close.

17:00:28 1 THE COURT: Ms. Ghavimi?

17:00:30 2 MS. GHAVIMI: One hour.

17:00:32 3 THE COURT: Well, I don't have a problem with giving

17:00:40 4 you an hour to the side. And I'm not sure it's necessary, but

17:00:48 5 in my trying to work out time, there's not a whole lot of

17:00:51 6 difference between 45 minutes to the side and an hour to the

17:00:55 7 side. And the plaintiff can, of course, reserve part of the

17:00:59 8 plaintiff's hour to argue.

17:01:01 9 Now, here is what we've got to look at is when we're

17:01:05 10 going to do it. I have an exciting week ahead of me. At one

17:01:11 11 point this week I'm going to take up the question of the

17:01:15 12 regents' rules on firearms in the classroom at the University

17:01:19 13 of Texas, and I've got a lengthy argument that I hope will get

17:01:32 14 a little shorter. So I would be, at the earliest, the end of

17:01:44 15 the week getting to argument.

17:01:49 16 What does your situation look like on Friday

17:01:52 17 afternoon? Could you do it then?

17:01:56 18 MR. CONNOR: Absolutely, Judge.

17:01:58 19 THE COURT: Ms. Ghavimi?

17:02:06 20 Well, you can talk out loud. It's all right to tell

17:02:09 21 me.

17:02:09 22 MR. ROGERS: I can't be here Friday. Ms. Ghavimi can

17:02:12 23 do the argument, but I'd hope you'd accommodate my schedule.

17:02:18 24 THE COURT: Well, what is your situation on Monday?

17:02:22 25 MR. ROGERS: That works.

17:02:27 1 THE COURT: I can entertain you Monday afternoon.

17:02:29 2 Is the plaintiff also available on Monday?

17:02:31 3 MR. TAYLOR: Yes, Your Honor. We would be available.

17:02:37 4 THE COURT: All right. Let's set this to argue on

17:02:40 5 Monday, August the 8th at 2 o'clock. Does that work for

17:02:51 6 everybody?

17:02:53 7 MR. ROGERS: Yes, Your Honor.

17:02:54 8 THE COURT: Now, I believe that I have adequate

17:02:58 9 briefing on this. Do you-all -- are you-all satisfied with

17:03:02 10 your briefing that we've had previously. If you're not, I

17:03:10 11 don't want additional briefing, but I will take a letter brief

17:03:14 12 with any additional citations you want me to look at. But I

17:03:20 13 don't need written argument because I'm going to hear from you

17:03:25 14 on Monday. But I will consider any additional case law you

17:03:31 15 want to call to my attention now that both parties have rested

17:03:39 16 and you know what the bulk of all of the evidence looks like.

17:03:42 17 So does the plaintiff want additional letter

17:03:47 18 briefing?

17:03:51 19 MR. TAYLOR: Only on something that might have come

17:03:53 20 up today that hadn't come up before. I need to discuss this

17:03:56 21 with him. But we'll do it according to your schedule and

17:04:00 22 submit it in a letter.

17:04:01 23 THE COURT: All right. Here's what we will do. If

17:04:04 24 you want to submit anything further to me, make it in the form

17:04:08 25 of letter briefs without argument, with just additional

17:04:12 1 authority you want me to look at, and have it in no later than
17:04:17 2 5 o'clock Thursday afternoon. That way I'll have it Friday and
17:04:23 3 over the weekend and Monday.

17:04:26 4 The reason I put a time down, I never would in the
17:04:30 5 past ever say a particular time. I'd just say by Friday. And
17:04:34 6 then we came up with computer filing, which lawyers, adhering
17:04:41 7 to the concept of nature abhors a vacuum, immediately reached
17:04:46 8 out and the day now ends at 11:59 instead of 5 o'clock for me.
17:04:51 9 So, I want it by 5 o'clock Thursday anything else you want to
17:04:55 10 present me, and I will consider -- I will look at that ahead of
17:04:59 11 time and consider it during argument.

17:05:02 12 Don't get too involved in coming up with an argument
17:05:09 13 that you think will fill an hour. You're likely to get a bunch
17:05:12 14 of questions from me, and I'm not likely to add that on to an
17:05:16 15 hour argument. So you'll have an hour to present, and that
17:05:23 16 will include any questions that I may ask you as we go along in
17:05:27 17 that.

17:05:28 18 I am going to want to, as I've said before, you to
17:05:33 19 direct me in your arguments to the specific parts of the
17:05:41 20 evidence that is in the record that we have made that in the
17:05:46 21 plaintiffs' case support the request for temporary relief, the
17:05:50 22 elements of it, where the plaintiff believes that they have
17:05:58 23 adduced adequate evidence to support a preliminary injunction
17:06:10 24 and a temporary receivership. Although one does not
17:06:14 25 necessarily go with the other, I might grant part relief and I

17:06:19 1 might grant not. So you want to look at it that way.

17:06:22 2 And then I want to hear, of course, from the
17:06:28 3 defendant on exactly what evidence is there that either
17:06:35 4 supports their defense or the weaknesses in the plaintiffs'
17:06:40 5 case on why the plaintiff has not gotten there with what the
17:06:48 6 plaintiff wants.

17:06:52 7 So that's what I'm after. The elements are well set
17:06:56 8 forth in the case law and the rules, so you know what you're
17:06:59 9 going to have to do.

17:07:01 10 So while I've got you here, anything else we need to
17:07:03 11 take up today?

17:07:05 12 MR. TAYLOR: No, Your Honor.

17:07:07 13 MS. GHAVIMI: No, Your Honor.

17:07:07 14 THE COURT: All right. Well, thank you-all, and I
17:07:09 15 will see you back here at 2 o'clock on Monday, the 8th. And I
17:07:15 16 will look forward to any additional letter briefing by
17:07:18 17 5 o'clock on Thursday.

17:07:21 18 At this time the court's in recess.

17:07:23 19 (End of transcript)

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1 **UNITED STATES DISTRICT COURT)**

2 **WESTERN DISTRICT OF TEXAS)**

3 I, Arlinda Rodriguez, Official Court Reporter, United
4 States District Court, Western District of Texas, do certify
5 that the foregoing is a correct transcript from the record of
6 proceedings in the above-entitled matter.

7 I certify that the transcript fees and format comply with
8 those prescribed by the Court and Judicial Conference of the
9 United States.

10 WITNESS MY OFFICIAL HAND this the 4th day of August 2016.

11

12 /S/ Arlinda Rodriguez
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